Supreme Court, U.S.
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No.

In the Supreme Court of the United States

BOROUGH OF DURYEA, PENNSYLVANIA, *et al.*,
Petitioners,

v.

CHARLES J. GUARNIERI,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Third Circuit erred in holding that state and local government employees may sue their employers for retaliation under the First Amendment's Petition Clause when they petitioned the government on matters of purely private concern, contrary to decisions by all ten other federal circuits and four state supreme courts that have ruled on the issue.

PARTIES TO THE PROCEEDING

In addition to the party identified in the caption, petitioners also include Duryea Borough Council; Ann Dommes, Individually and in her Official Capacity as Council President; Lois Morreale, Individually and in her Official Capacity as Borough Secretary; Frank Groblewski, Individually and in his Official Capacity as Councilman; Edward Orkwis, Individually and in his Official Capacity as Councilman; Robert Webb, Individually and in his Official Capacity as Councilman; Audrey Yager, Individually and in her Official Capacity as Councilwoman; Joan Orloski, Individually and in her Official Capacity as Councilwoman; and Alfred Akulonis, Individually and in his Official Capacity as Councilman.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Third Circuit, App., *infra*, 1a-15a, is available at 2010 WL 381398. The district court's memorandum and order granting in part and denying in part petitioners' motion for summary judgment is unreported. App., *infra*, 55a-95a. The district court's memorandum and order denying petitioners' motion for a new trial and judgment as a matter of law, App., *infra*, 16a-54a, is available at 2008 WL 4132035.

JURISDICTION

The judgment of the court of appeals was entered on February 4, 2010. Petitioners timely filed a petition for rehearing and rehearing en banc, which was denied on March 4, 2010. App., *infra*, 97a-98a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the Constitution of the United States provides, in pertinent part, that "Congress shall make no law * * * abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and the right of the people * * * to petition the Government for a redress of grievances."

STATEMENT

This case concerns whether state and local government employees may sue their employers for retaliation under the Petition Clause of the First Amendment, U.S. Const. Amend. I, cl. 6, when they petition on matters of purely private concern. The Third Circuit has repeatedly held that they can. See, *e.g.*, App., *infra*, 8a; *Foraker* v. *Chaffinch*, 501 F.3d 231, 236 (3d Cir. 2007); *Hill* v. *Borough of Kutztown*, 455 F.3d 225, 242 n. 24 (3d Cir. 2006); *San Filippo* v. *Bongiovanni*, 30 F.3d 424, 442-443 (3d Cir. 1994).

The Third Circuit's decision below conflicts with decisions of this Court, which have held that when "a public employee speaks * * * as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior." *Connick* v. *Myers*, 461 U.S. 138, 147 (1982). It is also contrary to the uniform rule of other appellate courts.

The ten other federal circuits, as well as the four state supreme courts, that have addressed this question have uniformly held that claims like respondent's are not cognizable. *Tang* v. *Department of Elderly Affairs*, 163 F.3d 7, 12 (1st Cir. 1998); *White Plains Towing Corp.* v. *Patterson*, 991 F.2d 1049, 1058-1059 (2d Cir. 1993); *Andrew* v. *Clark*, 561 F.3d 261, 269 (4th Cir. 2009); *Rathjen* v. *Litchfield*,

878 F.2d 836, 842 (5th Cir. 1989); *Jenkins* v. *Rock Hill Local Sch. Dist.*, 513 F.3d 580, 587 (6th Cir. 2008); *Belk* v. *Town of Minocqua*, 858 F.2d 1258, 1262 (7th Cir. 1988); *Gunter* v. *Morrison*, 497 F.3d 868, 872 (8th Cir. 2007); *Rendish* v. *City of Tacoma*, 123 F.3d 1216, 1220-1221 (9th Cir. 1997); *Martin* v. *City of Del City*, 179 F.3d 882, 887-889 (10th Cir. 1999); *D'Angelo* v. *School Bd.*, 497 F.3d 1203, 1211 (11th Cir. 2007); *Pratt* v. *Ottum*, 761 A.2d 313, 321 (Me. 2000); *Harris* v. *Mississippi Valley State Univ.*, 873 So. 2d 970, 984 (Miss. 2004); *McDowell* v. *Napolitano*, 895 P.2d 218, 225-226 (N.M. 1995); *Smith* v. *Bates Technical Coll.*, 991 P.2d 1135, 1145-1147 (Wash. 2000). The decision below stands contrary to the great weight of precedent and critically undermines the ability of state and local governments to manage their work forces. The Third Circuit has repeatedly refused to bring its law into accord with the uniform view of the other courts of appeals and this case represents an ideal vehicle for resolving this important and frequently recurring question.

A. Constitutional Background

The First Amendment guarantees "the right of the people * * * to petition the Government for a redress of grievances." U.S. Const. Amend. I, cl. 6. This Court has noted that this "[c]lause was inspired by the same ideals of liberty and democracy that gave us the freedoms to speak, publish, and assemble." *McDonald* v. *Smith*, 472 U.S. 479, 485 (1985). Recognizing that "[t]hese First Amendment rights are inseparable," it has held that "there is no

sound basis for granting greater constitutional protection to statements made in a petition * * * than other First Amendment expressions." *Ibid.*

In *Connick* v. *Myers*, 461 U.S. 138 (1983), this Court held that the First Amendment's Free Speech Clause does not protect a public employee from retaliation for speech on a matter of no public concern. Resting on "the common-sense realization that government offices could not function if every employment decision became a constitutional matter," *id.* at 143, this Court held that when a public employee speaks "upon matters only of personal interest * * * a federal court [should not] review the wisdom of a personnel decision taken by [the employer] in reaction to the employee's behavior," *id.* at 147. The decision below disregards this Court's holdings in both *McDonald* and *Connick*.

In *San Filippo* v. *Bongiovanni*, the Third Circuit refused to extend the public concern requirement that this Court applied to free speech retaliation claims in *Connick* to similar petition claims. 30 F.3d at 443. Rejecting the uniform view of all circuits that had considered the issue at the time, the *San Filippo* majority distinguished petition claims from free speech claims. "When one files a 'petition,'" the majority argued, "one is not appealing over government's head to the general citizenry; when one files a 'petition' one is addressing government and asking government to fix what, allegedly, government has broken or has failed in its duty to repair." *Id.* at 442. To disallow a retaliation claim because it addressed purely private concerns, the majority asserted, would make "the petition

clause * * * a trap for the unwary—and a dead letter." *Ibid.*

Judge Becker dissented vigorously on this point. He would have held "that a public employee plaintiff who has 'petitioned' is in no better position than one who has merely exercised free speech." *San Filippo*, 30 F.3d at 449 (Becker, J., concurring and dissenting). The majority's position, he believed, (1) defied "the inexorable logic of *McDonald* v. *Smith*," *ibid.*, (2) invited "wary [public employees] to formulate their speech on matters of private concern as a lawsuit or grievance in order to avoid being disciplined, [and (3)] would undermine the government's special role as an employer," *ibid.*

B. District Court Proceedings

After being dismissed as the chief of police for Duryea Borough, respondent Charles J. Guarnieri filed a grievance, which ultimately led to his full reinstatement after arbitration. App., *infra*, 4a. On his first day back, the Duryea Borough Council issued eleven directives to Guarnieri, instructing him how to perform certain aspects of his job.[1] *Ibid.* He filed another grievance, which led to another

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[1] The directives instructed him, among other things, (1) not to work more than eight hours a day or more than forty hours per week, (2) to follow Duryea's purchase order system, (3) to patrol four to five hours during every eight-hour shift, (4) to submit a weekly written report, (5) to use the police car only for official business, and (6) to keep the police department offices smoke-free. App., *infra*, 57a-59a.

arbitration, which directed the Borough to modify or withdraw some of the directives. *Ibid.* Other disputes arose, as a result of which Guarnieri filed this lawsuit, claiming that the directives and other acts constituted retaliation in violation of the Petition Clause for his having filed and won his initial grievance. App., *infra*, 5a. Later the Borough denied an overtime claim by Guarnieri on the ground that he had not explained why the overtime was necessary. *Ibid.* After an investigation, however, the Pennsylvania Department of Labor directed the Borough to pay the claim, *ibid.*, and Guarnieri amended his complaint to add the denial of overtime as a retaliatory act, *ibid.*, for his having filed his grievances and this lawsuit, Am. Compl. at 9.

Petitioners, Duryea Borough and various of its officials (collectively "Duryea"), sought summary judgment on Guarnieri's retaliation claim for filing his grievance and this lawsuit. App., *infra*, 55a-56a. Duryea argued, among other things, that Guarnieri's grievances and lawsuit did not represent protected activity because they concerned purely private matters. The district court, relying on *San Filippo*, denied Duryea summary judgment on the claim. "The filing of a formal petition," it held, "is protected without regard to whether the petition addresses a matter of public concern." App., *infra*, 79a (citing 30 F.3d 424, 442 (1995)). After trial, the jury found that issuing the directives and withholding overtime constituted retaliation and awarded Guarnieri damages. App., *infra*, 5a-6a.

Duryea then moved for judgment as a matter of law on the petition claim. It renewed its argument that only petitions addressing matters of public concern could give rise to retaliation claims. The district court, however, again relying on *San Filippo*, rejected it again: "The filing of * * * a petition is protected without regard to whether the petition addresses a matter of public concern." App., *infra*, 27a. The district court noted, however, "that the holding of *San Filippo* contravenes the law of numerous other circuit courts [and that] the Supreme Court has yet to decide the split in authority between the Third Circuit and other Courts of Appeals." *Ibid.*

C. Court of Appeals Proceedings

On appeal, the Third Circuit rejected Duryea's argument that it should adopt the uniform position of the other courts of appeals. Like the district court, it followed its holding in *San Filippo*:

> This court [has] held that "a public employee who has petitioned the government through a formal mechanism such as the filing of a lawsuit or grievance is protected under the Petition Clause from retaliation for that activity, even if the petition concerns a matter of purely private concern." Defendants urge us to overrule that holding because other courts of appeals disagree, *see San Filippo* v. *Bongiovanni*, 30 F.3d at 440 n. 19 (collecting cases); *Martin* v. *City of Del City*, 179 F.3d

> 882, 889 (10th Cir. 1999), but we are bound by our prior holding.

App., *infra*, 8a (quoting *Foraker* v. *Chaffinch*, 501 F.3d 231, 236 (3d Cir. 2007) (citing *San Filippo* v. *Bongiovanni*, 30 F.3d 424 (3d Cir. 1994)). The Third Circuit later denied Duryea's request for it to revisit this circuit precedent by denying its petition for rehearing and rehearing en banc. App., *infra*, 97a-98a.

REASONS FOR GRANTING THE PETITION

1. The Third Circuit's Decision Entrenches A Split Among The Circuits Over Whether The Petition Clause Protects Public Employees From Retaliation When They Petition On Matters Of Purely Private Concern

The First Amendment protects the right "to petition the Government for a redress of grievances." U.S. Const. Amend. 1, cl. 1. The courts of appeals are split, however, over whether the First Amendment protects a public employee from retaliation for petitioning the government about a matter of purely private concern. Ten courts of appeals have applied the standard that this Court developed in *Connick* v. *Myers* for free speech-based retaliation claims and have held expressly that in the retaliation context "a public employee's petition, like his speech, is constitutionally protected only when it addresses a matter of public concern." *Kirby* v. *City of Elizabeth City*, 388 F.3d 440, 448 (4th

Cir. 2004); accord *Jenkins* v. *Rock Hill Local Sch. Dist.*, 513 F.3d 580, 587 (6th Cir. 2008); *Martin* v. *City of Del City*, 179 F.3d 882, 887-889 (10th Cir. 1999); *Grigley* v. *City of Atlanta*, 136 F.3d 752, 755-756 (11th Cir. 1998); *Tang* v. *Department of Elderly Affairs*, 163 F.3d 7, 11-12 (1st Cir. 1998); *Rendish* v. *City of Tacoma*, 123 F.3d 1216, 1220-1223 (9th Cir. 1997); *White Plains Towing Corp.* v. *Patterson*, 991 F.2d 1049, 1059 (2d Cir. 1993); *Hoffmann* v. *Mayor of Liberty*, 905 F.2d 229, 233 (8th Cir. 1990); *Belk* v. *Town of Minocqua*, 858 F.2d 1258, 1261-1262 (7th Cir. 1988); *Day* v. *South Park Indep. Sch. Dist.*, 768 F.2d 696, 701-703 (5th Cir. 1985). All state courts of last resort that have addressed this question also agree that "in order for a public employee to have a viable § 1983 claim [under the Petition Clause], the petition must address a matter of public concern." *Pratt* v. *Ottum*, 761 A.2d 313, 320-321 (Me. 2000); accord *Harris* v. *Mississippi Valley State Univ.*, 873 So. 2d 970, 984 (Miss. 2004); *McDowell* v. *Napolitano*, 895 P.2d 218, 225-226 (N.M. 1995); *Smith* v. *Bates Technical Coll.*, 991 P.2d 1135, 1145-1147 (Wash. 2000).

These courts thus adhere to this Court's holding that "First Amendment rights are inseparable, and there is no sound basis for granting greater constitutional protection to statements made in a petition * * * than other First Amendment expressions." *Kirby*, 388 F.3d at 488 (citing *McDonald* v. *Smith*, 472 U.S. 479, 485 (1985)); accord *Grigley* v. *City of Atlanta*, 136 F.3d 752, 755-756 (11th Cir. 1998); *White Plains Towing Corp.* v. *Patterson*, 991 F.2d 1049, 1059 (2d Cir. 1993). These

courts have reasoned that to recognize retaliation claims lacking any public concern under the Petition Clause, when such claims are not recognized under the Free Speech Clause, would "elevate the Petition Clause to special First Amendment status." *Belk* v. *Town of Minocqua*, 858 F.2d 1258, 1261 (7th Cir. 1988) (quoting *McDonald*, 472 U.S. at 485). As this Court has instructed, however, "[t]he Petition Clause * * * was inspired by the same ideals of liberty and democracy that gave us the freedoms to speak, publish, and assemble." *Ibid.* As ten courts of appeals have recognized, "[w]ere we to adopt [the public employee's] position that the right to petition is absolute, we would be guilty of implementing precisely the sort of hierarchy of first amendment rights forbidden by *McDonald*." *Ibid.*; accord *Rendish*, 123 F.3d at 1222.

Fidelity to the principles explained in *McDonald* serves other important interests. Consistent with federalism principles, for example, the majority rule affords state and local governments necessary flexibility as employers rather than turning literally every minor employment decision into "a federal case." As the First and Second Circuits explained, "absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior." *Tang* v. *Department of Elderly Affairs*, 163 F.3d 7, 12 (1st Cir. 1998); *White Plains Towing Corp.*, 991 F.2d at 1058 (citing *Connick*, 461 U.S. at 147). These courts have reasoned that "government officials should enjoy wide latitude in

managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." *White Plains Towing Corp.*, 991 F.2d at 1058 (citing *Connick*, 461 U.S. at 146).

Many of these courts also have recognized that a contrary rule would permit public employees to make an end run around the public concern requirement for free speech retaliation claims simply by couching their expression in the form of a petition. Interpreting the Petition Clause to protect all public employee petitions from retaliation regardless of their purely private nature "would allow the anomalous result that a private employment dispute could be 'constitutionalized merely by filing a legal action.'" *Kirby*, 388 F.3d at 448 (citing *Altman* v. *Hurst*, 734 F.2d 1240, 1244 n.10 (7th Cir. 1984)); accord *Rendish*, 123 F.3d 1216, 1221 (9th Cir. 1997). These courts understand that "special treatment of the right to petition would unjustly favor those who through foresight or mere fortuity present their speech as a grievance rather than in some other form." *Belk*, 858 F.2d at 1262; accord *Hoffmann* v. *Mayor of Liberty*, 905 F.2d 229, 234 (8th Cir. 1990); *Day* v. *South Park Indep. Sch. Dist.*, 768 F.2d. 696, 703 (5th Cir. 1985).

The Third Circuit has repeatedly rejected the approach and reasoning of the majority and flouted this Court's precedents. It has held that "a public employee who has petitioned the government through a formal mechanism such as the filing of a lawsuit or grievance is protected under the Petition Clause from retaliation for that activity, even if the

petition concerns a matter of solely private concern." App., *infra*, 8a (citing *Foraker* v. *Chaffinch*, 501 F.3d 231, 236 (3d Cir. 2007); *San Filippo* v. *Bongiovanni*, 30 F.3d 424, 435-442 (3d Cir. 1994)). The Third Circuit has justified its rule by pointing to the "distinct origin of the Petition Clause" and has criticized this Court for "ignoring the varied histories of the right to petition and the freedoms of speech, religion, and the press." *Foraker*, 501 F.3d at 236 (citing *McDonald*, 472 U.S. at 485). While acknowledging *McDonald*, the Third Circuit rejects the essential logic of that decision and instead argues that "the right to petition has a pedigree independent of—and substantially more ancient—than the freedoms of speech and press." *San Filippo*, 30 F.3d. at 443. The Third Circuit contends that providing those who petition broader protection from retaliation than those who speak "is legitimate because the Petition Clause is not merely duplicative of the Free Speech Clause." *Foraker*, 501 F.3d at 236. According to the Third Circuit, "there is an independent reason—a reason of constitutional dimension—to protect an employee lawsuit or grievance if it is of the sort that constitutes a 'petition' within the meaning of the first amendment." *San Filippo*, 30 F.3d at 441-442.

The Third Circuit maintains that these differences in origin, pedigree, and purpose "correlate[] to *** separate analysis for each clause." *Foraker*, 501 F.3d at 237. In the Third Circuit's view, "[w]hereas the Free Speech Clause protects the right to 'wide-open' debate, the Petition Clause encompasses only activity directed to a

government audience." *Ibid.* Thus, "[w]hen one files a 'petition' one is not appealing over government's head to the general citizenry * * * one is addressing the government and asking government to fix what, allegedly, government has broken or has failed in its duty to repair." *Id.* at 236 (quoting *San Filippo*, 30 F.3d at 442). In this view, the "[P]etition [C]lause imposes on the [government] an *obligation* to have at least some channel open for those who seek redress for perceived grievances" and imposing a public concern requirement for retaliation in public employment cases would close those channels of communication to such an extent that it would render the Petition Clause a "dead letter." *Id.* at 247, 249 (Greenberg, J., concurring) (emphasis added).

The Third Circuit has repeatedly rejected requests to bring its view into line with the majority's. See, e.g., App., *infra*, 8a; *Foraker*, 501 F.3d at 236; *Hill* v. *Borough of Kutztown*, 455 F.3d 225, 242 n.24 (3d Cir. 2006); *San Filippo* v. *Bongiovanni*, 30 F.3d 424, 442-443 (3d Cir. 1994). By denying the petition for rehearing en banc in this case, it has confirmed that it will not revisit the issue on its own. See App., *infra*, 99a. Any review must come from this Court.

The long-standing split on this important issue warrants this Court's review. As the Third Circuit observed, this Court "has not discussed the scope of the constitutional right to petition in the context of an allegedly retaliatory discharge of a public employee." *San Filippo*, 30 F.3d at 435. It is,

moreover, a recurring question of great importance. As discussed in greater detail below, *infra*, Parts III(B) and IV, it affects the rights of a large segment of the population—all state and local employees—as well as the ability of state and local governments to manage their employees efficiently and without intrusive supervision from the federal courts.

II. The Third Circuit's Rule Violates This Court's Holding In *McDonald* v. *Smith* That The Petition Clause Protects Expression No More Than Does The Free Speech Clause

The Third Circuit's rule contravenes fundamental First Amendment principles this Court set forth in *McDonald* v. *Smith*, 472 U.S. 479 (1985). As this Court recognized there, neither the rights of petition nor speech should be given priority over the other; rather, they "are inseparable, and there is no sound basis for granting greater constitutional protection to statements made in a petition * * * than other First Amendment expressions." *Id.* at 485 (citing *Thomas* v. *Collins*, 323 U.S. 516, 530 (1945)).

The Court spoke unanimously on this point. As Justice Brennan elaborated in his concurring opinion, the "essential unity" of the First Amendment rights counsels against interpreting the Petition Clause as conferring an absolute privilege in a context in which the Free Speech Clause does not. *McDonald*, 472 U.S. at 489 (Brennan, J., concurring). "[T]here is no persuasive reason," he ex-

plained, "for according greater or lesser protection to expression on matters of public importance depending on whether the expression consists of speaking to neighbors across the backyard fence, publishing an editorial in the local newspaper, or sending a letter to the President of the United States." *Id.* at 490 (Brennan, J., concurring).

The Third Circuit's rule disrupts this fundamental parity. So long as a public employee formalizes in a petition a workplace complaint of no interest to the public, which he can do through the commonplace step of filing a grievance, the First Amendment protects him from retaliation. If he makes the same complaint through less formal speech, to which this Court's *Connick* standard applies, it does not.

Standing alone, *McDonald*'s logic reveals the error in the Third Circuit's approach and leaves no doubt that *Connick*'s public concern requirement must apply to petitions, as every other court of appeals addressing the issue has held. See pp. 8-9, *supra*.

III. The Third Circuit's Rule Violates The Principles Of *Connick* v. *Myers*

A. The Rationales This Court Identified In *Connick* For Protecting Public Employee Speech From Retaliation Only When It Implicates A Matter Of Public Concern Apply Equally To Petitions

Even if this Court had not held in *McDonald* that speech and petitions should be treated alike, the particular First Amendment principles that compel applying *Connick's* public concern requirement to free speech apply equally to petitions. In *Engquist* v. *Oregon Dep't of Agric.*, this Court identified two principles that underlie its public employment decisions:

> First, although government employees do not lose their constitutional rights when they accept their positions, those rights must be balanced against the realities of the employment context. Second, in striking the appropriate balance, we consider whether the asserted employee right implicates the basic concerns of the relevant constitutional provision, or whether the claimed right can more readily give way to the requirements of the government as employer.

128 S. Ct. 2146, 2152 (2008). In *Engquist*, these principles required rejecting "class-of-one" equal

protection claims in public employment. *Id.* at 2148-2149. Here, they require that public employee petitions address a matter of public concern before receiving protection from retaliation.

Starting with the second principle, the public concern requirement is indispensible if the retaliation claim is actually to implicate concerns at the heart of the First Amendment. In protecting from retaliation petitions addressing matters of purely private concern, the Third Circuit has mistakenly distinguished between the purposes of the Free Speech and Petition Clauses. See, *e.g.*, *Foraker*, 501 F.3d 231, 237 (3d Cir. 2007) ("Whereas the Free Speech Clause protects the right to 'wide-open' debate, the Petition Clause encompasses only activity directed to a government audience. This distinction correlates to the separate analysis for each clause."). The First Amendment Free Speech and Petition Clauses, however, share a singular purpose: to "assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Connick*, 461 U.S. at 145 (quoting *Roth* v. *United States*, 354 U.S. 476, 484 (1957); *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 269 (1964)); see also *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) (quoting *Carey* v. *Brown*, 447 U.S. 455, 467 (1980) ("This Court has recognized that expression on public issues 'has always rested on the highest rung of the hierarchy of First Amendment values.'")). It follows that expression that most facilitates this aim—expression on matters of public concern—"is entitled to special protection" under the First

Amendment. *Connick*, 461 U.S. at 145. The same cannot be said of expression on purely private matters. *See Kendish*, 123 F.3d 1216, 1223 (9th Cir. 1997) ("[The Third Circuit's approach] diverges from the Supreme Court's teachings that the primary function of the First Amendment is to facilitate participation in a free political process and that the First Amendment extends its guarantees to public employees in order to encourage such participation.").

This Court has long recognized that the government's special interests as employer warrant limiting protection of public employee speech to matters of public concern. In particular, this Court has held that, when a public employer has retaliated for employee speech, "[t]he problem * * * is to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of *public concern* and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering* v. *Board of Educ.*, 391 U.S. 563, 568 (1968) (emphasis added).

In *Connick*, this Court further held that when speech does not address a matter of public concern courts should not even engage in *Pickering* balancing. 461 U.S. at 146 ("[I]f [the employee speech in question] cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for us to scrutinize the reasons for [retaliation]."). This type of speech thus enjoys no First Amendment protection from retaliation. When

speech addresses purely private concerns, "government officials should enjoy wide latitude in managing their offices." *Ibid.* As *Connick* reasoned,

> [T]he Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch. Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency.

Id. at 151 (quoting *Arnett* v. *Kennedy*, 416 U.S. 134, 168 (1974) (Powell, J., concurring)).

The particular rationales that justified the public concern requirement in *Connick* apply equally when public employee expression takes the form of a petition. First, to the extent that a government employee's speech is disruptive, formalizing it by filing a written grievance or lawsuit—and thus engaging the government in a time-consuming formal dispute—would make it only more so. Second, speech and petitions should receive equal protection from public employer retaliation because the nature of the employer-employee relationship is the same, whatever the form of expression. Indeed, a public employer acts no less as an *employer* when it responds to expression in the form of a petition.

The same reasons *Connick* applied the public concern requirement to speech apply to petitions. When two types of expression, protected by the same constitutional amendment, give rise to similar consequences, no reason supports protecting one more than the other. Petitions should receive the same level of First Amendment protection from government employer retaliation as speech—no more, no less.

B. The Dangers Of Constitutionalizing Public Employment Law And Creating An End Run Around *Connick* Strongly Support Recognizing Only Those Retaliation Claims Involving Petitions On Matters Of Public Concern

Recognizing a cause of action for *every* public employee's claim of retaliation for filing employment grievances and making other formal employment complaints would constitutionalize many garden-variety employment disputes that rightfully belong in state court (if in any judicial forum). As this Court acknowledged in *Connick*, "it would indeed be a Pyrrhic victory for the great principles of free expression if the [First] Amendment's safeguarding of a public employee's right, as a citizen, to participate in discussions concerning public affairs were confused with the attempt to constitutionalize the employee grievance." 461 U.S. at 154. "[W]hile the First Amendment invests public employees with certain rights," this Court stated in *Garcetti* v. *Ceballos*, "it does not empower them to

'constitutionalize the employee grievance.'" 547 U.S. 410, 420 (2006) (quoting *Connick*, 461 U.S. at 154); see also *Engquist*, 128 S. Ct. 2146, 2156 (2008).

There are limits to what the First Amendment protects, and a public employee's interest in preserving his personal vision of his job deservedly rests outside the scope of protection. *See Board of Regents* v. *Roth*, 408 U.S. 564, 575 n.14 (1972) ("Whatever may be a teacher's rights of free speech, the interest in holding a teaching job at a state university, simpliciter, is not itself a free speech interest."). Just as this Court has declined to convert the Fourteenth Amendment into a "font of tort law," *Town of Castle Rock* v. *Gonzales*, 545 U.S. 748, 768 (2005) (citing *Parratt* v. *Taylor*, 451 U.S. 527, 544 (1981) (quoting *Paul* v. *Davis*, 424 U.S. 693, 701 (1976))), the Petition Clause must likewise not become a font of public employment law. Rather, personal grievances and petitions "are best left to internal procedures established by employers and employees or * * * where such procedures are inadequate, through state court adjudication." *Altman* v. *Hurst*, 734 F.2d 1240, 1244 (7th Cir. 1984).

By confounding petitioners' actions with violation of a constitutional right, the decision below permits federal litigation on all sorts of petitions and grievances. As other courts of appeals have recognized, "permitting [retaliation claims that lack a matter of public concern] would open the federal floodgates to all manner of petty personal disputes." *Altman*, 734 F.2d at 1244. This Court has already

rejected protecting speech exercised as part of a public employee's official duties because it "would commit state and federal courts to a new, permanent, and intrusive role, mandating judicial oversight of communications between and among government employees and their superiors in the course of official business." *Garcetti*, 547 U.S. at 423. "This displacement of managerial discretion by judicial supervision finds no support in [this Court's] precedents." *Ibid.* Simply put, a "federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies." *Bishop* v. *Wood*, 426 U.S. 341, 349 (1976).

Just as with speech, special protection for petitions of purely private concern would involve federal courts in everyday office management. It would "demand permanent judicial intervention in the conduct of governmental operations to a degree inconsistent with sound principles of federalism and the separation of powers." *Garcetti*, 547 U.S. at 423. As this Court explained in *Connick*, "[p]erhaps the government employer's dismissal of the worker may not be fair, but ordinary dismissals from government service which violate no fixed tenure or applicable statute or regulation are not subject to judicial review even if the reasons for dismissal are alleged to be mistaken or unreasonable." 461 U.S. at 146-147 (citing *Board of Regents* v. *Roth*, 408 U.S. 564; *Perry* v. *Sindermann*, 408 U.S. 593 (1972); *Bishop*, 426 U.S. at 349-350). When, as here, the alleged retaliation amounts to far less than dismissal—and, indeed, involves *ongoing supervision* of an

employee—federal judicial involvement is even less warranted.

Institutional and state remedies efficiently resolve workplace disputes without requiring government employers to waste valuable time and resources defending constitutional claims in federal court. Abandoning the public concern requirement displaces these remedies and allows many ultimately fruitless claims to survive a motion to dismiss in federal court. "[G]overnments will be forced to defend a multitude of such claims in the first place, and courts will be obliged to sort through them in a search for the proverbial needle in a haystack." *Engquist*, 128 S. Ct. at 2157. When a petition actually touches upon a matter of public concern, the federal courts' and public employers' time and attention might be warranted; when it does not, however, federal courts will waste valuable public resources, and plaintiffs will be able to assert "largely groundless claim[s] to simply take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value, rather than a reasonably founded hope that the *** process will reveal relevant evidence." *Dura Pharmaceuticals, Inc.* v. *Broudo*, 544 U.S. 336, 347 (2005) (quoting *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 741 (1975)). When the party facing liability in a retaliation case is a government employer, time-consuming litigation carries great costs to the efficient operation of local government offices—to the detriment of the offices' provision of services to citizens.

Relaxing *Connick's* public concern requirement in petition cases would, moreover, undermine *Connick* itself. By favoring petitions over speech, the Third Circuit's rule creates an easy end run around *Connick*'s public concern requirement. In *Connick*, for example, this Court held that most items in a questionnaire distributed by a government employee to her colleagues did not involve any matter of public concern and were thus unprotected. 461 U.S. at 148. If petitions need not involve matters of public concern to receive protection, then *Connick* loses much of its force. Had she not been terminated immediately, the plaintiff in *Connick* could simply have filed her questionnaire in a grievance in order to have received First Amendment protection. In other words, abolishing the public concern requirement for petitions gives public employees a perverse incentive to formalize any expression of complaint in a grievance, lawsuit, or other means of petition in order to escape *Connick's* strictures.

As recognized by numerous courts that have rejected the Third Circuit's reasoning, it makes no sense "to elevate * * * an employee's complaint [on a personal matter] to the level of constitutional protection merely because she has asserted it in the form of a grievance." *Day* v. *South Park Indep. Sch. Dist.*, 768 F.2d 696, 703 (5th Cir. 1985); accord *Kirby* v. *City of Elizabeth City*, 388 F.3d 440, 448 (4th Cir. 2004); *Belk* v. *Town of Minocqua*, 858 F.2d 1258, 1262 (7th Cir. 1988); see also *San Filippo*, 30 F.3d at 449 (Becker, J., concurring and dissenting) (warning that recognition of Petition Clause claims on matters

of purely private concern would represent "an invitation to the wary to formulate their speech on matters of private concern as a lawsuit or grievance in order to avoid being disciplined" and also would "undermine the government's special role as an employer"). The mere form an employment complaint takes should not determine the scope of First Amendment protection.

IV. This Case Presents An Ideal Vehicle For Resolving A Recurring And Important Issue Of Constitutional Law

This Court has long recognized that government's overall effectiveness rests in large part on its ability to manage its employees efficiently. See, *e.g.*, *Ex parte Curtis*, 106 U.S. 371, 373 (1882) (noting "[t]he evident purpose of congress * * * to promote efficiency and integrity in the discharge of official duties and to maintain proper discipline in the public service[, which] is within the just scope of legislative power"); *Arnett* v. *Kennedy*, 416 U.S. 134, 168 (1974) (Powell, J., concurring in part and concurring in the result in part) (noting "the public's interest [in] the maintenance of employee efficiency and discipline[, which] are essential if the Government is to perform its responsibilities effectively and economically."); *Connick*, 461 U.S. at 150-151. Most recently, in *Engquist*, this Court noted "the common-sense realization that government offices could not function if every employment decision became a constitutional matter." 128 S. Ct. at 2156 (quoting *Connick*, 461 U.S. at 143).

The Third Circuit's rule, however, does exactly that. By constitutionalizing many everyday disputes between public employers and employees, it turns the First Amendment into "a font of [employment law]." *Parratt* v. *Taylor*, 451 U.S. 527, 544 (1981). The rule below allows public employees to take state and local governments to federal court over run-of-the-mill employment disputes. This is far from a theoretical concern. District courts within the Third Circuit have routinely allowed public employees to "make a federal case" out of claims of alleged retaliation arising from filings relating to garden-variety disputes, such as the filing of (1) a municipal court criminal complaint for assault growing out of a fight outside a bar, *McGovern* v. *City of Jersey City*, No. 98-5186 (JLL), 2007 WL 2893323 (D.N.J. Sept. 28, 2007); (2) a lawsuit challenging a police force suspension arising from an incident in which a policeman's ex-girlfriend wrongly accused a private security employee of having sex with her ex-boyfriend, *Morgan* v. *Covington Twp*, No. 3:07-cv-1972, 2009 WL 585480 (M.D. Pa. Mar. 6, 2009); (3) a workman's compensation claim for an injured shoulder, *Moore* v. *Darlington Twp.*, No. 08-1012, 2010 WL 597989 (W.D. Pa. Feb. 17, 2010); and (4) a tort claim notice involving alleged dress code violations, *Marrero* v. *Camden County Bd. Of Soc. Services*, 164 F. Supp. 2d 455 (D.N.J. 2001). Indeed, in the present case, the Third Circuit made a federal case out of retaliation for the filing of a grievance concerning, among other things, the Borough's right to designate a building smoke-free, set an employee's work hours, and demand that the Borough's only

full-time police officer manage traffic at the only school in town at the beginning and end of the school day. App., *infra*, 57a-59a.

The sheer number of state and local employees worsens the burden such claims impose on both public employers and federal courts. The Third Circuit alone contains an estimated 1,050,316 full-time state and local employees, who are free to bring suits alleging retaliation for the filing of an employment grievance implicating no public concern. United State Census Bureau, 2008 Annual Survey of State and Local Government Employment and Payroll, http://www.census.gov/govs/apes/ (last accessed April 29, 2010) (noting Delaware has 43,913, New Jersey 465,049, and Pennsylvania 529,454 public employees, respectively); U.S. Dep't of Labor, Bureau of Labor Statistics, Database on the Virgin Islands, http://www.bls.gov/data (noting Virgin Islands have 12,900). More broadly, the question presented affects the rights of all 14,857,827 state and local employees across the country, United States Census Bureau, 2008 Annual Survey of State and Local Government Employment and Payroll, and the efficient functioning of state and local governments everywhere.

This case, moreover, represents an ideal vehicle for resolving the circuit split. The parties fully argued the issue at every stage below and both the court of appeals and the district court expressly addressed it. See App., *infra*, 8a, 27a, 78a-79a. The issue involves a pure question of law and is squarely presented by the petition.

The Third Circuit, moreover, has shown it has no intention of resolving this split on its own. It has repeatedly acknowledged that its rule conflicts with other circuits, see, *e.g.*, *San Filippo*, 30 F.3d at 439-440; App., *infra*, 8a, and it has consistently denied requests for rehearing en banc of cases concerning this question, see *San Filippo*, 30 F.3d 424, *petition for rehearing en banc denied* Aug. 18, 1994; *Foraker*, 501 F.3d 231, *petition for rehearing en banc denied* Oct. 10, 2007; App., *infra*, 97a. Worse still, the Third Circuit's clear and deeply entrenched position discourages public employers from litigating the issue and seeking appeal. Under the Third Circuit's rule, state and local governments know retaliation claims will survive a motion to dismiss, likely require discovery, and entail possible trial. Faced with that prospect, they will not only fail to press for the rule to be reconsidered, but also will face overwhelming pressure to settle claims in order to avoid the expense and disruption of fighting them on other grounds. Because of such perverse litigation incentives, a better vehicle to resolve the split and bring Third Circuit law into conformity with *McDonald* and *Connick* is highly unlikely to come before this Court.

In light of the conflict of the decision below with *McDonald*, *Connick*, and other decisions of this Court and with the decisions of all the ten other federal courts of appeals and of the four state supreme courts that have addressed the issue, this Court should consider disposing of the case summarily. Vacating the decision below and

remanding the case to the Third Circuit for proceedings consistent with a per curiam opinion holding that state and local employees cannot sue their employers for retaliation under the First Amendment's Petition Clause unless the petitions involved matters of public concern would be appropriate.

CONCLUSION

The petition for a writ of certiorari should be granted and the case set for oral argument or, in the alternative, the petition for a writ of certiorari should be granted, the decision below vacated, and the case remanded for proceedings consistent with a per curiam opinion holding that state and local employees cannot sue their employers under the Petition Clause unless their petitions involved matters of public concern.

Respectfully submitted.

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June 2010

APPENDIX

APPENDIX A

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 08-3949

Charles J GUARNIERI, Jr.

v.

DURYEA BOROUGH; DURYEA BOROUGH COUNCIL; ANN DOMMES, Individually and in her Official Capacity as Council President; LOIS MORREALE, Individually and in her Official Capacity as Borough Secretary; FRANK GROBLEWSKI, Individually and in his Official Capacity as Councilman; EDWARD ORKWIS, Individually and in his Official Capacity as Councilman; ROBERT WEBB, Individually and in his Official Capacity as Councilman; AUDREY YAGER, Individually and in her Official Capacity as Councilwoman; JOAN ORLOSKI, Individually and in her Official Capacity as Councilwoman; AKULONIS, Individually and in his Official Capacity as Councilman,

Appellants

No. 08-4428

Charles J. GUARNIERI, Jr.
Appellant

v.

DURYEA BOROUGH; DURYEA BOROUGH COUNCIL; ANN DOMMES, Individually and in her Official Capacity as Council President; LOIS MORREALE, Individually and in her Official Capacity as Borough Secretary; FRANK GROBLEWSKI, Individually and in his Official Capacity as Councilman; EDWARD ORKWIS, Individually and in his Official Capacity as Councilman; ROBERT WEBB, Individually and in his Official Capacity as Councilman; AUDREY YAGER, Individually and in her Official Capacity as Councilwoman; JOAN ORLOSKI, Individually and in her Official Capacity as Councilwoman; AKULONIS, Individually and in his Official Capacity as Councilman.

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. No. 3-05-cv-01422)
District Judge: Honorable A. Richard Caputo

Argued October 27, 2009

Before: SLOVITER, FUENTES and HARDIMAN
Circuit Judges

(Filed February 4, 2010)

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OPINION

SLOVITER, *Circuit Judge*.

Appellants Duryea Borough, the Borough Secretary, and members of the Borough Council (collectively "Defendants") appeal a jury's verdict and award of punitive damages on claims that they violated the First Amendment right to petition of appellee Charles J. Guarnieri, the former Chief of Police of Duryea. Guarnieri cross-appeals the District Court's reduction of his attorney's fees.

I.

Background

In February 2003, the Duryea Borough Council dismissed Guarnieri from his position as Chief of Police. Guarnieri filed a union grievance, which led to an arbitration. After about two years, Guarnieri prevailed and was reinstated to his position as Chief.

On his first day back, in January 2005, the Council issued eleven "directives" to Guarnieri. These directives comprised a list of things that Guarnieri must do or could not do on the job. Guarnieri filed a union grievance to complain about the directives, which led to another arbitration. Ultimately, the arbitrator directed Duryea to modify or abandon some of the directives.

Other disputes, often petty, arose between

Guarnieri and Defendants.[1] As a result, Guarnieri filed this lawsuit, claiming in relevant part that the directives and other acts by Duryea constituted unconstitutional retaliation for his having filed and won his 2003 grievance.

In December 2006, Guarnieri submitted a request for approximately $338.00 in overtime. The overtime was denied by the Council on the ground that Guarnieri did not explain why the overtime was necessary. The Department of Labor investigated and "found [that withholding the] overtime . . . was a violation" of the law. App at 649. Guarnieri amended his complaint to add the overtime denial as a retaliatory act.

Three of Guarnieri's First Amendment retaliation claims reached the jury: (1) the issuance of the directives; (2) the purported delay in the issuance of health insurance benefits; and (3) the withholding of overtime. The jury found for Guarnieri on the first and third claims, and awarded him a total of $45,358.00 in compensatory damages - $5,000 against each individual defendant for damages deriving from the directives; and $350.00

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[1] For example, the Council apparently told Guarnieri not to participate in truancy and seat belt programs even though those activities were funded by a grant and cost the Borough nothing. Also, Guarnieri sought to have his health insurance cover his wife, but the Borough Secretary, Morreale, did not credit Guarnieri's assertion that he was married and demanded additional paperwork, even though Guarnieri submitted a marriage licence signed by Duryea's mayor.

for damages due by the Borough and one dollar due from each individual for withholding the overtime. The jury also awarded Guarnieri a total of $52,000 in punitive damages - $3,000 against each individual defendant for issuance of the directives, and $3,500 against each individual defendant for the overtime.

The District Court denied Defendants' motions for judgment as a matter of law and for a new trial. The Court, however, granted in part Defendants' motion to reduce the attorney's fees requested by Guarnieri. It first reduced the requested number of hours (473.8) by ninety-one because of "duplicativeness [with a similar First Amendment retaliation case against Duryea brought by a Borough employee, also represented by Guarnieri's lawyer] . . . inapplicability . . . [and] excessiveness." App. at 47-48. After making some other deductions, the Court arrived at a "total of three hundred ninety (390) hours" that it found to be reasonable for the work performed by Guarnieri's lawyer through the trial. App. at 48. The Court then added thirty-two hours for post-trial work to which Defendants did not object and made a few other adjustments to the total hours not relevant here.

After reviewing Guarnieri's counsel's experience, the Court determined that a reasonable rate was $215 an hour, rather than the requested rate of $300 an hour. The Court referenced its prior decision in *Lohman v. Borough*, No. 05-1423, 2008 WL 2951070, at *7-8 (M.D. Pa. July 30, 2008), where it had fixed Guarnieri's counsel's fee at $215 an hour. The District Court calculated that the

"lodestar" for the sum of all legal work on Guarnieri's case was $102,110.25. The Court made a further, omnibus reduction to the lodestar of over 50%; in the end it awarded only $45,000 in fees.[2]

II.

Analysis

Defendants contend they are entitled to judgment as matter of law, arguing: (1) that the evidence did not support a finding of punitive damages; (2) that the First Amendment does not protect government employees from retaliation for the filing of petitions unless they address matters of public concern; (3) that Guarnieri's petitioning activity was not protected because it was performed pursuant to his official duties; (4) that Defendants were entitled to qualified immunity because the law was not clearly established; and (5) that, for a variety of reasons, the evidence was insufficient to support liability. Defendants also argue they are due a new trial because the District Court denied their request to introduce into evidence sections of the 2005 arbitrator's report. Guarnieri cross-appeals the Court's omnibus reduction of the lodestar.

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[2] The District Court had jurisdiction under 28 U.S.C. §§ 331 and 1343. This court has jurisdiction under 28 U.S.C. § 1291.

A. The First Amendment and Qualified Immunity

This court held that "a public employee who has petitioned the government through a formal mechanism such as the filing of a lawsuit or grievance is protected under the Petition Clause from retaliation for that activity, even if the petition concerns a matter of solely private concern." *Foraker v. Chaffinch*, 501 F .3d 231, 236 (3d Cir. 2007) (citing *San Filippo v. Bongiovanni*, 30 F.3d 424 (3d Cir. 1994)). Defendants urge us to overrule that holding because other courts of appeals disagree, *see San Filippo*, 30 F.3d at 440 n. 19 (collecting cases); *Martin v. City of Del City*, 179 F.3d 882, 889 (10th Cir. 1999), but we are bound by our prior holding.

Defendants also assert that "neither the Third Circuit nor the Supreme Court has decided the question of whether or not an employee who is petitioning the government pursuant to his official duties is acting as a citizen for First Amendment purposes" Appellants' Brief at 24 (citing *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006)). We need not decide that issue because Defendants cite to no evidence that Guarnieri's union grievance was made pursuant to his official duties.

Our decision in *San Filippo* is clearly established, controlling law, and Defendants are not entitled to qualified immunity. *See Francisco Jose Rivero v. City and County of San Francisco*, 316 F.3d 857, 865 (9th Cir. 2002) ("The issue is not what the law was or might have been in other circuits . . . . [i]t

is, rather, what the 'controlling authority in [the defendants'] jurisdiction [was] at the time of the incident ' " (quoting *Wilson v. Layne*, 526 U.S. 603, 617 (1999)).

B. Sufficiency of the evidence[3]

Defendants' argument that Borough Secretary Morreale is not liable because she was merely performing clerical duties belies the evidence. Among other things, the Council acted through Morreale, Duryea's personnel manager, who was responsible for paying Guarnieri, and the directive stating that Guarnieri had to obey orders was given by the Council through Morreale. "Personal involvement can be shown through allegations of personal direction or of actual knowledge and acquiescence." *Rode v. Dellarciprete*, 845 F.2d 1195, 1207 (3d Cir. 1988).

Defendants also argue that there was no evidence that Dommes, Groblewski, Orkwis, Webb, Yager, and Orloski were involved in the withholding of overtime. However, they all had been Council members at some time and did not argue to the jury that they were no longer Council members when the decision denying Guarnieri's overtime pay was

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[3] "We review a denial of judgment as a matter of law *de novo*, viewing the evidence in the light most favorable to the prevailing party." *Monteiro v. City of Elizabeth*, 436 F.3d 397, 404 (3d Cir. 2006) (citing *Caver v. City of Trenton*, 420 F.3d 243, 262 (3d Cir. 2005)).

made.[4] The District Court referenced ample witness testimony from which a juror could reasonably infer it was the Council that withheld the overtime.

Defendants' arguments that the only evidence of retaliation was temporal proximity, and that the temporal proximity evidence was insufficient are unpersuasive. The directives were issued the day that Guarnieri returned to work; there was evidence of continued acrimony between Guarnieri and Defendants; and this action was ongoing when the overtime was withheld.

Defendants argue that the issuance of the directives and the failure to pay Guarnieri for overtime would not have deterred "a person of ordinary firmness from exercising his constitutional rights." Appellants' Brief at 35. First Amendment retaliation claims are indeed cognizable only when the retaliatory act would " 'deter a person of ordinary firmness' from exercising his First Amendment rights," *Suppan v. Dadonna*, 203 F.3d 228, 235 (3d Cir. 2000), but the " 'deterrence threshold,' . . . is very low . . . . [as] a cause of action is supplied by all but truly de minimis violations," *O'Connor v. City of Newark*, 440 F.3d 125, 128 (3d Cir. 2006) (citing *Suppan*, 203 F.3d at 234-35). "Even 'an act of retaliation as trivial as failing to hold a birthday party for a public employee,' if 'intended to punish her for exercising her free speech rights,' may be actionable . . . ." *O'Connor*, 440 F.3d at 128 (quoting

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[4] Dommes and Webb testified but apparently never denied that they or others participated on the Council at the relevant times.

Suppan, 203 F.3d at 234) (internal quotations omitted)). The jury was instructed to determine whether the retaliation in this case would have deterred a person of ordinary firmness, and we will not second-guess its verdict.

The argument of Duryea Borough that it had no policy or custom concerning any of the actions of which Guarnieri complains and therefore has no liability is unavailing because a "single decision by a final policy-maker . . . may constitute official policy," *San Filippo*, 30 F.3d at 445 (citing *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480-81 (1986)). There was ample evidence that the Council both made Borough policy and was responsible for the retaliatory acts.

C. New trial

Defendants challenge the District Court's exclusion of the 2005 arbitrator's report. Defendants do not specify any error in the District Court's reasoning that the report was hearsay. Their citations and arguments concerning prejudice, however, are unconvincing; indeed, during the trial the Court upheld many of their objections to Guarnieri's use of the report. Defendants had ample opportunity, which they used, to tell their position.

D. Punitive damages

Defendants argue that there was insufficient evidence to support the jury's award of punitive damages. *See Springer v. Henry*, 435 F.3d 268, 281

(3d Cir. 2006) (holding that a "jury may award punitive damages when it finds reckless, callous, intentional, or malicious conduct."). We agree with them on this point. Although the record supports the jury's finding that issuance of the directives and the withholding of overtime pay were retaliatory acts, and that those acts were petty and careless, neither those acts, nor any of the other petty and careless acts committed by Defendants, show "reckless or callous indifference to the federally protected rights of others." *Brennan v. Norton*, 350 F.3d 399, 428 (3d Cir. 2003) (quoting *Smith v. Wade*, 461 U.S. 30, 56 (1983)). Overall, these acts support little "more than the retaliatory motive itself." *Brennan*, 350 F.3d at 429-30.

E. Attorney's fees

Finally, in his cross-appeal Guarnieri challenges the District Court's reduction of the lodestar. The District Court gave the following reasons: (1) the "overlapping labor" with the *Lohman* case; (2) its belief that Guarnieri's case was not novel or difficult because the issues were similar to those in *Lohman*, and because counsel had brought § 1983 claims in the past; (3) the case was taken on a contingency basis, which, at an assumed 33% fee rate (no rate was provided to the Court) would have resulted in an attorney's award of about $40,000; and, (4) the attorney's fee award in *Lohman* was only $30,000.[5] Reliance on these reasons was legal

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[5] Notably, the District Court did not apportion based on the number of successful claims. Nor did the

error.[6]

"We review a district court's award of fees for abuse of discretion[,] . . . review a district court's factual determinations, including . . . the number of hours [an attorney] reasonably worked on the case, for clear error[,] . . . [and][w]e exercise plenary review over the legal standard that the district court used in calculating the award." *United Auto. Workers Local 259 Soc. Sec. Dep't v. Metro Auto Ctr.*, 501 F.3d 283, 290 (3d Cir. 2007) (citations and quotations omitted); *Student Pub. Interest Research Group of New Jersey, Inc. v. AT & T Bell Labs.*, 842 F.2d 1436, 1442 n. 3 (3d Cir. 1988).

In *City of Burlington v. Dague*, the Supreme Court stated that "the difficulty of establishing [the] merits" of a claim is "ordinarily reflected in the lodestar . . . [and thus] [t]aking account of it again through lodestar enhancement amounts to double counting." 505 US. 557, 562-63 (1992) (internal citations omitted). The Supreme Court has also "specifically held . . . that the 'novelty [and] complexity of the issues,' 'the special skill and experience of counsel,' the 'quality of representation,' and the 'results obtained' from the litigation are presumably fully reflected in the lodestar amount.

District Court characterize the work by Guarneri's attorney as inferior.

[6] Guarnier. also argues the District Court erred in setting counsel's hourly rate at $215. That rate is not clear error. *See United Auto. Workers Local 259 Soc. Sec. Dep't v. Metro Auto Ctr.*, 501 F.3d 283, 290 (3d Cir. 2007); *see also Lohman* 574 F.3d at 164 n. 1.

and thus cannot serve as independent bases for increasing the basic fee award." *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565 (1986) (quoting *Blum v. Stenson*, 465 U.S. 886, 898-900 (1984)); *United Auto. Workers*, 501 F.3d at 292.

The factors on which the District Court relied in reducing this "lodestar," i.e., the difficulty of the case, overlapping hours, and counsel's experience, were the same as the factors it considered in establishing the lodestar.[7]

The District Court also erred by using the contingency nature of a case to reduce fees, a practice specifically prohibited by *Dague*. *See* 505 U.S. at 561-62.[8] In addition, the District Court's use

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[7] The District Court further erred because it gave Defendants relief they never asked for. Defendants only requested reductions for specifically identified hours as overlapping with *Lohman*, and stated that "[i]f time was marked as specifically for work done on the Guarnieri matter, Defendants do not seek to reduce that time." Dist. Ct. Dkt. 133 pg. # 14. Ordinarily, Courts should not *sua sponte* apply negative multipliers. *See Rode*, 892 F.2d at 1192.

[8] We recognize that the referenced Supreme Court cases prohibited double counting in connection to the increase of fees awards, and that here the District Court decreased the fees. However, Defendants make no argument, and we can think of none, why these holdings would not apply equally to prohibit a district court from double counting to reduce fees. *See, e.g., Van Gerwen v. Guarantee Mut. Life Co.*, 214 F.3d 1041, 1048 (9th Cir. 2000) ("A district court may not rely on a contingency

of the fee award in *Lohman* (where the lodestar was significantly lower) as support for the downward multiplier was error. The award in that case was reduced significantly because the plaintiff had rejected a settlement offer that was much higher than the ultimate jury award. *Lohman*, 574 F.3d 163. There is no evidence of such an offer here. Further, the jury in *Lohman* awarded the plaintiff only $12,000. Other than overlapping work and counsel's familiarity with the legal issues, both of which were subsumed into the lodestar, there is little reason why the fee award in *Lohman* is relevant.

III.

Conclusion

The jury's verdict on the merits will be upheld except for the punitive damages award, which will be vacated. This case will be remanded to the District Court for a recalculation of attorney's fees consistent with the standards articulated in this opinion.

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agreement to increase or decrease what it determines to be a reasonable attorney's fee.")

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CHARLES GUARNIERI,	No. 3:05-CV-01422
Plaintiff,	(JUDGE CAPUTO)
v.	
DURYEA BOROUGH, et al.,	
Defendants.	

MEMORANDUM

Presently before the Court are Defendants Duryea Borough, Ann Dommes, Lois Morreale, Frank Groblewski, Edward Orkis, Robert Webb, Audrey Yager, Joan Orloski, and Alfred Akulonis' post-trial motions. These motions include a renewed Motion for Judgment as a Matter of Law pursuant to Federal Rule of Civil Procedure 50, a Motion for a New Trial pursuant to Federal Rule of Civil Procedure Rule 59, and a Motion to Stay Proceedings

to Enforce Judgment. (Docs.121, 127.) Because sufficient evidence exists such that a reasonable juror could find for the Plaintiff, and because there is no significant error of law on which to grant a new trial, the Rule 50 and 59 motions will be denied. As the Court will dispose of the Rule 50 and 59 motions in this Memorandum and Order, Defendants' motion to stay will be denied as moot.

BACKGROUND

On July 18, 2005, Plaintiff Charles Guarnieri, Jr. filed a civil action against Duryea Borough, Ann Dommes, Lois Morreale, Frank Groblewski, Edward Orkis, Robert Webb, Audrey Yager, Joan Orloski, and Alfred Akulonis. (Doc. 1.) Plaintiff filed his Amended Complaint against these Defendants on December 21, 2006. (Doc. 38.) The Amended Complaint alleged various claims including violations of his Fourteenth Amendment pre- and post-deprivation due process rights, and several claims of First Amendment retaliation. (Doc. 38.) Defendants filed an Answer to the Amended Complaint on December 29, 2006. (Doc. 43.) On December 22, 2006, the Defendants moved for summary judgment. (Doc. 39.) On November 15, 2007, the motion for summary judgment was granted in part and denied in part. (Doc. 51.) The remaining claims involved allegations of violations of Plaintiff Guarnieri's First Amendment rights. (Doc. 51.)

The remaining counts went to trial on April 14, 2008. The jury returned a verdict on April 17,

2008 in favor of the Plaintiff with respect to retaliation for the issuance of the directives and the withholding of overtime compensation, and awarded forty-five thousand, three-hundred and fifty-eight dollars ($45,358.00) in compensatory damages and fifty-two thousand dollars ($52,000.00) in punitive damages. (Doc. 101.)

Following trial, Defendants filed various post-trial motions, including a renewed Motion for Judgment as a Matter of Law pursuant to Federal Rule of Civil Procedure 50, a Motion for a New Trial pursuant to Federal Rule of Civil Procedure Rule 59, and a Motion to Stay Proceedings to Enforce Judgment. (Docs.121, 127.)

These motions are fully briefed and ripe for disposition.

LEGAL STANDARDS

I. Rule 50(b)

Under Rule 50(b), a party may renew its request for a motion for judgment as a matter of law by filing a motion no more than ten (10) days after judgment is entered. *See* FED. R. CIV. P. 50(b). In the present case, Defendants' Rule 50(b) motion was timely filed. (Doc. 218.) Judgment notwithstanding the verdict should be granted sparingly. *See Walter v. Holiday Inns, Inc.*, 985 F.2d 1232, 1238 (3d Cir. 1993). In deciding whether to grant a Rule 50(b) motion:

> the trial court must view the evidence in the light most favorable to the non-moving party, and determine whether the record contains "the minimum quantum of evidence from which a jury might reasonably afford relief." The court may not weigh evidence, determine the credibility of witnesses or substitute its version of the facts for that of the jury. The court may, however, enter judgment notwithstanding the verdict if upon review of the record, it can be said as a matter of law that the verdict is not supported by legally sufficient evidence.

Parkway Garage, Inc. v. City of Philadelphia, 5 F.3d 685, 691-92 (3d Cir. 1993), *abrogation on other grounds recognized by United Artists Theatre Circuit, Inc. v. Twp. of Warrington, Pa.*, 316 F.3d 392 (3d Cir. 2003) (citations omitted). A Rule 50 motion will be granted "only if, viewing the evidence in the light most favorable to the nonmovant and giving [the nonmovant] the advantage of every fair and reasonable inference, there is insufficient evidence from which a jury reasonably could find liability." *Lightning Lube v. Witco Corp.*, 4 F.3d 1153, 1166 (3d Cir. 1993). The question is not whether there is literally no evidence supporting the non-moving party, but whether there is evidence upon which the jury could properly find for the non-moving party. *See Walter*, 985 F.2d at 1238 (citing *Patzig v. O'Neil*, 577 F.2d 841, 846 (3d Cir. 1978)).

II. RULE 59(a)

Under Rule 59(a), motions for a new trial must be filed within ten (10) days of the date the judgment was entered. *See* FED. R. CIV. P. 59. Defendants' motion for a new trial was timely filed. (Doc. 209.) The decision to grant a new trial is left to the sound discretion of the trial judge. *See Blackiston v. Johnson*, No. 91-5111, 1995 WL 563834, at *1 (E.D.Pa.1995), *aff'd* 91 F.3d 122 (3d Cir. 1996), *cert. denied* 519 U.S. 953 (1996). Courts have granted motions for a new trial where: (1) there is a significant error of law, to the prejudice of the moving party; (2) the verdict is against the weight of the evidence; (3) the size of the verdict is against the weight of the evidence; or (4) counsel engaged in improper conduct that had a prejudicial effect on the jury. *See Maylie v. Nat'l R.R. Passenger Corp.*, 791 F.Supp. 477, 480 (E.D.Pa.), *aff'd* 983 F.2d 1051 (3d Cir. 1992). Where the evidence is in conflict, and subject to two (2) or more interpretations, the trial judge should be reluctant to grant a new trial. *See Klein v. Hollings*, 992 F.2d 1285, 1295 (3d Cir. 1993).

DISCUSSION

I. Renewed Motion for Judgment as a Matter of Law

Defendants first move for judgment as a matter of law after trial pursuant to Rule 50 of the Federal Rules of Civil Procedure. Rule 50(b)

provides, in relevant part:

> [i]f the court does not grant a motion for judgment as a matter of law made under Rule 50(a), the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. No later than 10 days after the entry of judgment - or if the motion addresses a jury issue not decided by a verdict, no later than 10 days after the jury was discharged - the movant may file a renewed motion for judgment as a matter of law . . . .

FED. R. CIV. P. 50(b). Plaintiff argues that Defendants waived their right to a renewed motion for judgment as a matter of law when they failed to make a motion at the close of all evidence. *See Kruczek v. Borough of Lansford*, Civ. A. No. 3:04-CV-1179, 2006 WL 1410620, at *1 (M.D. Pa. May 21, 2006) (Caputo, J.) (citing *Greenleaf v. Garlock, Inc.*, 174 F.3d 352, 364 (3d Cir. 1999)) (finding Defendants waived their right to a renewed motion for judgment as a matter of law when they failed to raise the motion at the close of evidence). Defendants, however, did renew their Rule 50 motions at the close of evidence. (Trial Tr. vol. 3, 202-03, Apr. 16, 2008.)

Furthermore, *Kruczek* was decided prior to the 2006 Amendments to the Rule 50. The Advisory Committee Notes on the 2006 Amendment to Rule 50 state that "Rule 50(b) is amended to permit

renewal of any Rule 50(a) motion for judgment as a matter of law, deleting the requirement that a motion be made at the close of all the evidence. Because the Rule 50(b) motion is only a renewal of the preverdict motion, it can be granted only on grounds advanced in the preverdict motion."

Defendants did properly renew their Rule 50 motion. Even if they had not, Defendants need not raise a Rule 50 motion at the close of the evidence as per the 2006 Amendment to Rule 50(b). Therefore, Defendants may renew their motion for judgment as a matter of law.

II. Punitive Damages

Defendants first argue that they are entitled to judgment as a matter of law as to the punitive damages award. The jury awarded fifty-two thousand dollars ($52,000.00) in punitive damages to Plaintiff Guarnieri. (Doc. 100.) Defendants argue that the evidence at trial was insufficient to support this award.

"The purpose of punitive damages is to punish the defendant for his willful or malicious conduct and to deter others from similar behavior." *Memphis Cmty. Sc. Dist. v. Stachura*, 477 U.S. 299, 306 n.9 (1986). "A jury may be permitted to assess punitive damages in an action under § 1983 when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." *Smith v. Wade*, 461 U.S. 30, 56 (1983).

The United States Constitution prevents "grossly excessive" punitive damage awards because such awards "further[] no legitimate purpose and constitutes an arbitrary deprivation of property." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416-17 (2003). In determining if a punitive damages award is reasonable, the court must consider: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." *Id.* at 418 (citing *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574-75 (1996)).

"[T]he must [sic] important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *Id.* at 419 (quoting *Gore*, 517 U.S. at 575). In evaluating reprehensible conduct, a court should look to whether: "the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident." *Id.*

Defendants' argument focuses on this first prong of the three-pronged inquiry. Specifically,

Defendants assert that none of the above stated factors were present in this case, and therefore an award of punitive damages is not warranted. First, Defendants note that the harm suffered by Plaintiff Guarnieri was economic, rather than physical. Second, Defendants note that the First Amendment retaliation claims did not effect the health or safety of others. Third, Defendants argue that Plaintiff Guarnieri was not financially vulnerable. Fourth, Defendants argue that the conduct was not repeated. Finally, Defendants assert that it was not the result of intentional malice, trickery, or deceit.

Although the facts do not support the first three (3) factors, the fourth and fifth factors are supported by the facts. There is evidence in the record that actions against Plaintiff Guarnieri were repeated. Such evidence included the fact that Plaintiff received the directives and was denied overtime pay, as found by the jury. Furthermore, a reasonable juror could find that Defendants acted with malice in both issuing the directives and withholding the overtime pay. In this case, a reasonable juror could find that the conduct on part of the Defendants was malicious or wanton, and that such conduct was reprehensible. A reasonable juror could find that the directives were issued based upon wanton or malicious conduct based upon the fact that Plaintiff Guarnieri received the directives on January 21, 2005, upon his return to work after the conclusion of his grievance procedure. A jury could also find the conduct of Defendants to be wanton or malicious with respect to the denial of overtime pay. A jury could find that a fiscal retaliatory action of

denying overtime pay to a person who files a grievance to be wanton or malicious. Although all of the factors are not supported by the facts, the fourth and fifth factor weigh in favor of the reasonableness of the jury's award.

The second prong of the punitive damages test considers the difference between the punitive damages and the actual or potential harm suffered by the plaintiff. Here, the compensatory damages awarded by the jury totaled forty-five thousand, three-hundred and fifty-eight dollars ($45,358.00), compared to fifty two thousand dollars ($52,000.00) in punitive damages. (Doc. 101.) The Supreme Court has "been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award." *State Farm*, 538 U.S. at 424. However, the *State Farm* Court stated that, "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to significant degree, will satisfy due process." *Id.* at 425. Citing *Gore*, the Court noted that a four-to-one (4-to-1) ratio may be close to the constitutional limits. *Id.* In this case, the ratio of punitive to compensatory damages is slightly greater than a one-to-one (1-to-1) ratio. The punitive damages in this case are not so great as to be constitutional [sic] excessive.

Finally, the Court is to consider the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. In this respect, Plaintiff cites to

the case of *DeLuzio v. Monroe County*, No. 3:CV-00-1220, 2006 WL 3098033 (M.D. Pa. Oct. 30, 2006) (Vanaskie, J.), *aff'd* 271 Fed App'x 193 (3d Cir. 2008). In *DeLuzio*, Judge Vanaskie denied the defendant's motion for judgment as a matter of law on a punitive damages award of twenty-five thousand dollars ($25,000.00) for a First Amendment claim. *Id.* at *14-15. The Third Circuit Court of Appeals affirmed the district court, noting that a jury could infer evil intent on part of the defendant, including from testimony about the defendant's hostility towards the plaintiff. 271 Fed. App'x at 198.

The jury in this case awarded fifty-two thousand dollars ($52,000.00) on two (2) claims of First Amendment retaliation. The *DeLuzio* jury awarded twenty-five thousand dollars ($25,000.00) for one (1) claim of First Amendment retaliation. In comparison to *DeLuzio*, the punitive damages award granted by the jury on the First Amendment claims is not unreasonable.

The evidence supports the jury's award of punitive damages. The award is reasonable based upon the ratio of the compensatory to punitive damages, the punitive damages award in similar cases, and the degree of reprehensibility of the Defendants' conduct. For these reasons, the Court will deny the Defendants' motion for judgment as a matter of law on the punitive damages claim.

III. Matter of Public Concern

Defendants argue that the Court should award the Defendants judgment as a matter of law because Plaintiff's petition did not address a matter of public concern. The Third Circuit Court of Appeals has previously held that the First Amendment's Petition Clause protects a public employee from retaliation for filing non-sham lawsuits, grievances, and other petitions directed at the government or its officials. *See San Filippo v. Bongiovanni*, 30 F.3d 424, 439 (3d Cir. 1994), *cert. denied*, 513 U.S. 1082 (1995). The filing of such a petition is protected without regard to whether the petition addresses a matter of public concern. *Id.* at 442. A petition is protected as long as it is filed in good faith, and the petition is not a sham. *Id. San Filippo* noted that formal mechanisms of filing a grievance include grievance procedures pursuant to a collective bargain agreement. *Id.* at 442. Defendants note that the holding of *San Filippo* contravenes the law of numerous other circuit courts, and therefore this Court should grant judgment as a matter of law for the Defendants. At this time, the Supreme Court has yet to decide the split in authority between the Third Circuit and other Courts of Appeals. Therefore, the law of *San Filippo* remains good law in this circuit. As a good faith grievance pursuant to a collective bargaining agreement has specifically been protected within the meaning of the Petition Clause by the Third Circuit Court of Appeals in *San Filippo*, Defendants' motion for judgment as a matter of law will be denied on these grounds.

IV. Government Employee Filing a Petition

Defendants next argue that they should be granted judgment as a matter of law because Plaintiff Guarnieri was a public employee petitioning his government employer. Defendants cite *Foraker v. Chaffinch*, 501 F.3d 231, 248-49 (3d Cir. 2007) to support the argument that Plaintiff Guarnieri's public employee relationship with Duryea Borough created a lack of protected conduct within the meaning of the First Amendment. Quoting the Supreme Court case of *Garcetti v. Ceballos*, 547 U.S. 410, 422 (2006), the *Foraker* court held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Id.* at 239. Based upon this rationale, the Third Circuit Court of Appeals held that when police officers complained to a state auditor about hazardous conditions at a firing range, they spoke pursuant to their duty as government employees. *Id.* at 240.

Defendants cite the following language of the *Foraker* opinion in support of the proposition that a government employee's petition to his government employer is not protected: "[w]hile the Supreme Court did not address the question of whether the rule it announced in *Garcetti* applies to First Amendment retaliation claims based on a public employee's petitioning activities, as distinguished from his speech, there is good reason to believe that

it does." *Id.* at 248-49 (Greenberg, J., concurring). This language appears in Judge Greenberg's concurring opinion, and is dicta regarding a public employee's petition rights. Therefore, it is not binding law on this court.

Furthermore, the grievance filed by Plaintiff Guarnieri was not made pursuant to his "official duties." Rather, he filed his grievance as a private citizen. Plaintiff's filing of the grievance regarding the termination of his employment and the filing of this lawsuit were not actions taken pursuant to his "official duties" as chief of police. Therefore, the *Garcetti* exception to First Amendment protection does not apply. Defendants' argument for judgment on a matter of law will therefore be denied on these grounds.

V. Qualified Immunity

Defendants next contend that they were entitled to qualified immunity on Plaintiff Guarnieri's First Amendment retaliation claims. The Third Circuit Court of Appeals in *Rouse v. Plantier* discussed the defense of qualified immunity:

> Under this doctrine, "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." "The contours of the right must be sufficiently clear that a reasonable

> official would understand that what he is doing violates that right."

182 F.3d 192, 196 (3d Cir. 1999) (citations omitted).

In determining the applicability of qualified immunity, the Court must first consider "whether, '[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the [government official's] conduct violated a constitutional right?' " *Cipriani v. Lycoming County Hous. Auth.*, 177 F.Supp.2d 303, 326 (M.D. Pa. 2001) (McClure, J.) (quoting *Saucier v. Katz*, 533 U.S. 194, 201 (2001)). In this case, the jury concluded that the government officials of Duryea did violate Plaintiff's constitutional rights - specifically, Plaintiff's First Amendment rights. The record reflects the jury's finding that Plaintiff received the directives and was denied overtime payment because he filed a grievance and a lawsuit. The jury's verdict determined that this was the reason for the actions of the government officials. *Id.* (noting that the jury's verdict reflected the violation of the plaintiff's First Amendment rights).

The second step of the inquiry requires the Court to consider " 'whether the right was clearly established.' " *Id.* (quoting *Saucier*, 533 U.S. at 201.) The inquiry regarding clearly established rights must be considered "in light of the specific context of the case." *Id.* (quoting *Saucier*, 533 U.S. at 201.) A claim for qualified immunity is denied when the law is clearly established because " 'a reasonably competent public official should know the

law governing his conduct' unless [he] can either demonstrate extraordinary circumstances or that [he] 'neither knew nor should have known' about the legal right in question." *Id.* (quoting *Gruenke v. Seip*, 225 F.3d 290, 299 (3d Cir. 2000) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982)).

Defendants argue that there are two (2) areas of the law which are not clearly established. First, Defendants argue that it is not clearly established that a government employee may petition his government employer. Second, Defendants argue that it is not clearly established that the public employee's rights are protected when the matter is one of private concern.

As stated in *Cipriani*, "the law was clearly established that a public employee, such as plaintiff, could not be retaliated against for exercising his rights under the First Amendment." *Id.* (citing *Baldassare v. New Jersey*, 250 F.3d 188, 201 (3d Cir. 2001) (citing *Zamboni v. Stamler*, 847 F.2d 73, 80 n.7 (3d Cir. 1988)). At the time of Defendants' conduct, the law was clearly established that Defendants could not retaliate against the filing of a grievance or the filing of a lawsuit. *Id.* at 327-28. No reasonable government official in Defendants' position could believe that retaliating against Plaintiff by issuing directives and denying overtime was appropriate conduct. *Id.* at 328.

Furthermore, the law regarding petitions by a government employee was clearly established. The Supreme Court in *Garcetti v. Ceballos* only

considered speech made by government employees in the course of their "official duties." 547 U.S. 410 (2006). It is clear that a grievance regarding employment, and a lawsuit based upon the First Amendment were not made pursuant to official duties. As for *Foraker*, the language that a government employee may not be able to file a petition against a government employer is part of

Judge Greenberg's concurrence, and is dicta. Such language does not overcome the clearly established right of a person to file a petition.

Defendants further argue that the law is not clearly established that a matter of private concern is protected under the Petition Clause of the First Amendment. Although a number of other circuits have held otherwise, the law in the Third Circuit is clearly established. Specifically, in *San Filippo v. Bongiovanni*, 30 F.3d 424, 440 (3d Cir. 1994), the Third Circuit Court of Appeals held that a petition is protected regardless of whether the petition is a matter of public concern. Therefore, there is a clearly established right to petition for a matter of private concern in this circuit.

As the First Amendment law is clearly established, Defendants are not entitled to qualified immunity, and not entitled to judgment as a matter of law on these grounds.

VI. Personal Involvement in Overtime

Defendants request that judgment as a matter of law be entered in favor or Defendants Dommes, Morreale, Groblewski, Orkwis, Webb, Yager, and Orloski because the record does not contain evidence of personal involvement or action with respect to the withholding of Plaintiff Guarnieri's overtime pay.

"It is, of course, well established that a defendant in a civil rights case cannot be held responsible for a constitutional violation which he or she neither participated in nor approved." *C.H. ex rel. Z.H. v. Oliva*, 226 F.3d 198, 201-02 (3d Cir. 2000) (citing *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1293 (3d Cir. 1997); *Baker v. Monroe Township*, 50 F.3d 1186, 1190 (3d Cir. 1995). Liability cannot be based solely on *respondeat superior*. *Rode v. Dellarciprete*, 845 F.2d 1195, 1207 (3d Cir. 1988). "Personal involvement can be shown through allegations of personal direction or of actual knowledge and acquiescence." *Id.*

Specifically, Defendants argue that the only Defendants named in relation to the withholding of the overtime pay were Lois Morreale and Alfred Akulonis. They assert that the record reflects that the decision to withhold the pay was made by Defendant Akulonis, and was dictated to the Borough Secretary, Lois Morreale. Defendants first argue that Lois Morreale was the Borough Secretary, and only performing her clerical duties in informing Plaintiff Guarnieri of his denial of overtime.

The evidence in the record suggests that Lois Morreale was personally involved in the withholding of Plaintiff Guarnieri's overtime pay. Lois Morreale testified as to her role in Plaintiff Guarnieri's overtime. After the United States Department of Labor audited Duryea Borough for violations, Ms. Morreale noted that the Department of Labor "gave me until March 26th to have proof that I paid the overtime. Oh, when he was leaving, I agreed to pay the overtime." (Trial Tr. vol. 3, 141:11-17;21-23, Apr. 16, 2008.) A reasonable juror could find that Ms. Morreale's "agreement" to issue the overtime check to Plaintiff Guarnieri established personal involvement by Ms. Morreale.

Next, Defendants argue that there is no evidence of a Council vote regarding the withholding of Plaintiff Guarnieri's overtime. Furthermore, Defendants assert that there were no facts showing a discussion among the council members discussing the withholding of the overtime pay. For these reasons, Defendants argue that Defendants Dommes, Groblewski, Orkwis, Webb, Yager, and Orloski should be granted judgment as a matter of law on the claim for overtime based upon a lack of personal involvement.

However, there is testimony from which a reasonable juror could find personal involvement on the part of the individuals. Alfred Akulonis was asked "were you the person who *initially* refused to pay the $330 in overtime to Chief Guarnieri?" (Trial Tr. vol. 1, 99:7-8, Apr. 14, 2008) (emphasis added).

Mr. Akulonis responded yes, and explained that he made that decision "because I didn't have - - I didn't have the facts." (Trial Tr. vol. 1, 99:9-12, Apr. 14, 2008.) Later in his testimony, Mr. Akulonis stated that the reason Plaintiff Guarnieri was denied overtime was that "[w]e did it because - - I mean, we didn't know if he worked or not . . . . We didn't approve it. In the directives it says that it has to be approved. So we didn't approve it." (Trial Tr. vol. 1, 100:17-22, Apr. 14, 2008.) From this testimony, the "we" can be inferred to be that Council did not approve the overtime, which is why he was not paid overtime.

The testimony of Lois Morreale at trial is consistent with the notion that council was involved with the denial of overtime. Ms. Morreale testified that

> Chief Guarnieri had been putting overtime-well, since the directives were in place, I believe the first directive said that overtime was only allowed if it was in extraordinary or emergency situations . . . . When I got the time sheet in December, I wrote a letter to Mayor Moss, and I wrote a letter to Chief Guarnieri asking them to explain the reasons for the overtime, and I didn't get any response.
>
> And so *council* decided not to issue the check for the overtime because they had told him and told him and nothing was ever done. So they thought about withholding his time maybe we'd get an explanation and they

> would pay him, but the explanation never came. So this-they withheld his pay.

(Trial Tr. vol. 3, 140:16-141:9, Apr. 16, 2008) (emphasis added). From the testimony of Lois Morreale, it also appears that the members of Duryea Council were involved in the withholding of Plaintiff Guarnieri's overtime pay. Based upon the testimony at trial, there is sufficient evidence of personal involvement of the members of Council in the denial of Plaintiff Guarnieri's overtime pay. Therefore, the Court will deny Defendants' motion for judgment as a matter of law on these grounds.

VII. Municipal Liability of Duryea Borough

Defendants move for judgment as a matter of law on the grounds that the evidence was insufficient to support a jury verdict against Duryea Borough. Pursuant to *Monell v. Department of Social Services*, 436 U.S. 658 (1978), "a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." *Id.* at 694. For a municipality or other government entity to be liable under § 1983, Plaintiff must establish: (1) a deprivation of a constitutionally protected right; (2) resulting from a policy, practice, or custom. *Id.* at 691-94.

"Policy is made by an official statement of a 'decisionmaker possessing final authority to establish municipal policy,' and custom can be shown by the presence of a course of conduct that 'is so well-settled and permanent as virtually to constitute law.'" *Chernavsky v. Twp. of Holmdel Police Dep't*, 136 Fed. App'x 507, 509 (3d Cir. 2005) (non-precedential) (quoting *Bielevicz v. Dubinon*, 915 F.2d 845, 850 (3d Cir. 1990)) (internal quotations omitted). Additionally, a plaintiff must show "a direct causal link between a municipal policy or custom and the alleged constitutional violation." *Id.* (citing *Carswell v. Borough of Homestead*, 381 F.3d 235, 244 (3d Cir. 2004); *Brown v. Muhlenberg Twp.*, 269 F.3d 205, 214 (3d Cir. 2001)).

Defendants argue that Plaintiff failed to prove any policy or custom executed by Duryea Borough with respect to Plaintiff Guarnieri's First Amendment retaliation claim with respect to the issuance of the directives or the denial of overtime.

The Third Circuit Court of Appeals in *San Filippo v. Bongiovanni*, 30 F.3d 424, 445 (3d Cir. 1994) noted that "[a] single decision by a final policy-maker, as defined by state law, may constitute official policy." *Id.* (citing *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480-81 (1986)). In this case, there is no question that Duryea Borough Council was an official policy-making authority for Duryea Borough. Defendant Ann Dommes testified that

> We all sat down on these directives. Once the Philadelphia lawyers told us that we can put things in writing, we had a personnel meeting and the whole council came up with different ideas. Everybody threw something in, what they felt they needed for the chief to do. So we sat down.
>
> We-Lois wrote everything down as we came up with them. She sent them down to the Philadelphia lawyers, and they looked everything over and fine tuned them into this.

(Trial Tr. vol. 1, 143:9-16, Apr. 14, 2008.) When asked who sat down to make the decisions, Ms. Dommes replied "All of council at that time." (Trial Tr. vol. 1, 143:20, Apr. 14, 2008.) She further testified that Borough Council was elected by the people of Duryea. (Trial Tr. vol. 1, 143:21-24, Apr. 14, 2008.) This testimony demonstrates that the policy in this case was enacted when Duryea Borough Council discussed and passed the eleven (11) directives. Therefore, on the issue of the directives, there is sufficient evidence of policy-making by Duryea Borough for a reasonable juror to find *Monell* liability.

The denial of Plaintiff Guarnieri's overtime pay is similarly supported by evidence describing the actions of Duryea Borough Council. As stated above, the testimony of Lois Morreale evidences action on the part of Duryea Borough Council in denying Plaintiff Guarnieri of his overtime pay. Ms. Morreale testified that "council decided not to issue

the check for the overtime because they had told him and told him and nothing was ever done. So they thought about withholding his time maybe we'd get an explanation and they would pay him, but the explanation never came. So this-they withheld his pay." (Trial Tr. vol. 3, 141:3-9, Apr. 16, 2008.) Although the record does not contain evidence of an official vote to withhold Plaintiff Guarnieri's pay, the decision to "not issue the check" constitutes a "single decision by a final policy-maker" for purposes of *Monell* liability. Therefore, there is sufficient evidence for a reasonable juror to find *Monell* liability on the issue of Plaintiff Guarnieri's overtime pay. Therefore, the Court will deny Defendants' motion for a judgment as a matter of law on the grounds of *Monell* liability.

VIII. Evidence on Causation

The First Amendment retaliation inquiry requires the Plaintiff to demonstrate that the 2003 grievance was a substantial factor in the issuance of the January 21, 2005 directives.

The substantial factor test does not require Plaintiff to prove"but-for" [sic] causation. *Suppan v. Dadonna*, 203 F.3d 228, 236 (3d Cir. 2000). " '[S]ubstantial factor' does not mean 'dominant' or 'primary' factor . . . . Thus, even if a plaintiff shows that activity protected by the First Amendment was a 'substantial factor' in her [adverse action], the defendant may show that some other factor unrelated to the protected activity was the but-for cause of the [adverse action]." *Hill v. City of*

Scranton, 411 F.3d 118 (3d Cir. 2005) (citations omitted).

In demonstrating substantial factor causation, the Third Circuit Court of Appeals has noted that "a suggestive temporal proximity between the protected activity and the alleged retaliatory action can be probative of causation." *Thomas v. Town of Hammonton*, 351 F.3d 108, 114 (3d Cir. 2003). In *Krouse v. Am. Sterilizer Co.*, 126 F.3d 494, 503 (3d Cir. 1997), the Third Circuit Court of Appeals did not resolve whether the timing of an alleged retaliatory action can by itself, support a finding of causation. *Id.* The court noted that "[e]ven if timing alone could ever be sufficient to establish a causal link, . . . the timing of the alleged retaliatory action must be 'unusually suggestive' of retaliatory motive before a causal link will be inferred." *Estate of Smith v. Marasco*, 318 F.3d 497, 512 (3d Cir. 2003) (quoting *Krouse v. Am. Sterilizer Co.*, 126 F.3d 494, 503 (3d Cir. 1997)). Temporal proximity is a fact-based analysis, which depends on "how proximate the events actually were, and the context [of the issue]." *Farrell v. Planters Lifesavers Co.*, 206 F.3d 271, 279 (3d Cir. 2000). For example, there is a difference between a temporal relationship of two (2) days and nineteen (19) months. *Id.* at 280.

A plaintiff may also prove evidence of causation besides temporal proximity. *Farrell*, 206 F.3d at 281. For example, a court may consider actual antagonistic conduct or animus. *Id.* The record may also be viewed as a whole. *Id.* ("[I]t can be other evidence gleaned from the record as a whole

from which causation an be inferred."). In demonstrating causation, a plaintiff may put forth evidence of "any antagonism toward the [plaintiff] or any change in demeanor toward [plaintiff]." THIRD CIRCUIT MODEL JURY INSTRUCTIONS, SECTION 1983-EMPLOYMENT DISCRIMINATION-RETALIATION-FIRST AMENDMENT, § 7.4 (2007).

Defendants argue that there is no "temporal proximity" that may be construed as retaliation. First, Defendants argue that the directives were issued two years after the filing of Plaintiff Guarnieri's termination grievance. (Pl.'s Ex. 12.) Second, Defendants argue that the denial of the overtime pay occurred in December 2006, nearly one-and-a-half years after the filing of this July 18, 2005 lawsuit. (Compl., Doc. 1.) (Trial Tr. vol. 1, 82:1-4, Apr. 14, 2008.) Furthermore, Defendants argue that the only evidence of causation is the alleged temporal proximity.

With respect to Plaintiff Guarnieri's 2003 grievance and the issuance of the 2005 directives, there is sufficient evidence for a reasonable jury to find temporal proximity as a means of "substantial factor" causation. Although the filing of the 2003 grievance by Plaintiff Guarnieri occurred approximately two (2) years prior to the alleged retaliatory action, a reasonable jury could still find temporal proximity. Plaintiff Guarnieri's 2003 grievance, the protected activity, resulted in his return to work for Duryea Borough. The issuance of the directives occurred on January 21, 2005, the same date as

Plaintiff's return to work, which was the fruition of his grievance. Therefore, a reasonable jury could find temporal proximity based upon the fruition of Plaintiff's grievance and the issuance of the directives.

Such a link of temporal proximity does not exist between the filing of the current lawsuit and the denial of Plaintiff's overtime pay. This lawsuit was filed in July 2005, and the denial of the overtime pay did not occur until December 2006. Although there is an overlap of time between the lawsuit and the denial of overtime, there appears to be no temporal proximity. However, this is not a fatal flaw. Plaintiff may also demonstrate causation in ways besides temporal proximity, such as the existence of acts of animus.

Plaintiff Guarnieri demonstrated other "antagonism" or "change in demeanor" that could cause a reasonable jury to find "substantial factor" causation. Plaintiff demonstrated general animus in several ways. First, a jury could infer general animus because the directives were only directed to Plaintiff Guarnieri, and no other Duryea police officer. (Trial Tr. vol. 2, 12:23-25, Apr. 15, 2008). Second, Plaintiff Guarnieri offered evidence that Duryea Borough refused to accept his marriage license. (Trial Tr. vol. 2, 69:24-70:25, Apr. 15, 2008.) Third, Plaintiff Guarnieri put forth evidence that Defendants failed to properly put his step-daughter on his health care coverage. (Trial Tr. vol. 2, 71:12-72:8, Apr. 15, 2008.)

Defendants argue that the denial of health and life insurance was not the result of retaliation, as found by the jury. (Doc. 101.) The jury found that these specific actions were not retaliatory actions for purposes of a First Amendment retaliation claim, however, these actions still may be indicative of causation, as causation can be demonstrated by acts of general animus.

Based on the temporal proximity between the fruition of Plaintiff Guarnieri's grievance and the issuance of the directives, and the other evidence of general animus by Defendants towards Plaintiff Guarnieri, a reasonable jury could find "substantial factor" causation. Therefore, the Court will deny Defendants' motion for judgment as a matter of law on these grounds.

IX. Evidence of Ordinary Firmness

Defendants further argue that their renewed motion for judgment as a matter of law should be granted because there was no evidence presented at trial that the alleged retaliatory actions were sufficient to deter a person of ordinary firmness from exercising his First Amendment rights. *Thomas v. Independence Township*, 463 F.3d 285, 296 (3d Cir. 2006).

"The effect of the alleged conduct on the employee's freedom of speech need not be great in order to be actionable, but it must be more than *de minimus*." *McKee v. Hart*, 436 F.3d 165, 170 (3d Cir. 2006) (internal quotation marks omitted). But,

"[e]ven 'an act of retaliation as trivial as failing to hold a birthday party for a public employee,' if 'intended to punish her for exercising her free speech rights,' may be actionable if sufficient 'to deter a person of ordinary firmness' from exercising his or her First Amendment rights." *O'Connor v. City of Newark*, 440 F.3d 125, 127 (3d Cir. 2006) (quoting *Suppan v. Dadonna*, 203 F.3d 228, 234-35 (3d Cir. 2000) (citing *Rutan v. Republican Party*, 497 U.S. 62, 76 n.8 (1990)). In *O'Connor*, the Third Circuit Court of Appeals noted that the threshold for a First Amendment retaliation claim is very low and "a cause of action is supplied by all but truly de minimus violations." *Id.* (citing *Suppan*, 203 F.3d at 234-35).

In this regard, several pieces of record evidence support the jury's conclusion that the retaliatory acts were sufficient to deter a person of ordinary firmness. The jury found two (2) retaliatory actions-the issuance of the January 21, 2005 directives and the denial of overtime pay. Defendants argue that the issuance of the directives were "reasonable" as per the testimony of Mayor Keith Moss. (Trial Tr. vol. 2, 140-154, Apr. 15, 2008.) Although there is testimony by Mayor Moss that some of the directives may save the Borough some money, this alone does not mean that they are not retaliatory actions, or that the actions would not stop a person of ordinary firmness from exercising his First Amendment rights.

he [sic] January 21, 2005 directives could be found retaliatory and therefore sufficient to deter a

person of ordinary firmness. (Pl.'s Ex. 12.) The jury was presented with the list of directives, which stated:

1. Your daily shift consists of eight hours. You are not to work more than eight hours per day or more than forty hours per week unless you receive express permission from Borough Council. You are to go home at the end of your eight hour shift.

2. You are not to attend council meetings as the chief of police and will not be paid for attending council meetings. You may only attend as a citizen.

3. You must follow the purchase order system. You personally will be responsible for getting all purchase orders signed for your department.

4. The dayshift officer must observe the arrival and dismissal times of the Holy Rosary School. Hours are 7:45a.m.-8:20a.m. and 2:00p.m.-2:30p.m. This has become a daily practice and must be continued. Any reason that this is not completed must be in writing and included in your weekly written report.

5. You must patrol 4-5 hours during your eight hour shift. Proof of patrol will be a copy of the daily mileage log. Therefore, a copy of the daily mileage log of all shifts must be included with your weekly report to be

handed in on Monday.

6. Council will issue directives to the borough secretary and to the borough solicitor. Any borough council directive which you receive from either the borough solicitor or the borough secretary should be treated as a directive of the borough council. Accordingly, you are required to follow any and all directives given to you by borough council, whether directly, or indirectly through the borough secretary or the borough solicitor.

7. You will submit a weekly written report to the borough secretary on the following Monday by 1:00 p.m. This report shall include a detailed description of your daily activities, including the task of patrolling the Holy Rosary bus stop. Proof of your activities shall include the time at which the tasks were performed. In addition, you will include the starting and ending mileage on the patrol vehicle for the time in which you are patrolling.

8. A copy of the monthly schedule for the police department must be given to the borough secretary by the first of the month.

9. The police car is to be used for official business only. Only borough officials and passengers of officials [sic] business only are allowed in the police car.

10. The Duryea municipal building is a smoke free building. The police department is not exempt from this smoking ban. Random checks will be done to insure that the building is smoke free. You will be held responsible for your department to adhere to the no smoking regulation.

11. As Chief of Police, you are to work the dayshift, which is Monday through Friday 7:00a.m.-3:00p.m. As your employer, Duryea Borough Council wants our Chief of Police to be visible and accessible to the public during the dayshift hours.

(*Id.*) This list of directives was issued the day that Plaintiff Guarnieri returned to work as Chief of the Duryea Borough Police, following a grievance procedure. A reasonable juror could find that this list would deter a person of ordinary firmness from filing a grievance in the future, as the directives could be viewed as restrictive by a reasonable juror.

Similarly, the jury found that Defendants denied Plaintiff Guarnieri overtime pay in retaliation for filing his grievance. The record reflects that Plaintiff Guarnieri was not paid three-hundred and thirty-eight dollars ($338.00) in overtime pay. (Trial Tr. 162:1-3, Apr. 15, 2008.)

Viewing the evidence in the light most favorable to Plaintiff Guarnieri, there is a legally sufficient basis for a reasonable juror to find that

Defendants' actions would deter a person of ordinary firmness from exercising his rights. The test does not require that Plaintiff Guarnieri actually be deterred, but that a person of ordinary firmness be deterred from exercising his First Amendment rights. Therefore, the Court will deny the Defendants' Rule 50 motion on these grounds.

X. Arbitrator's Report

Defendants argue that they should be granted a new trial on the grounds that the Court erred in refusing to allow the Defendants to present and read to the jury certain sections of the arbitrator's report reinstating Plaintiff to his employment. The Court ruled that the arbitrator's report was hearsay, and therefore inadmissible.

Defendants note that when Plaintiff initially sought to have the arbitrator's report introduced, Defendants objected on the grounds of hearsay and lack of personal knowledge by the witness. (Trial Tr. vol. 1, 60:21-61:6, Apr. 14, 2008.) The Court sustained the objection, and did not allow into evidence the findings of the arbitrator on the grounds of hearsay and lack of personal knowledge. (Trial Tr. vol. 1, 60:21-61:6, Apr. 14, 2008.) Defendants later attempted to introduce the report of the arbitrator after the exhibit had been discussed on the cross-examination of Scott Blissman by Plaintiff's counsel. The Court denied Defendants' request to admit the report into evidence. (Trial Tr. vol. 3, 76:12-23, Apr. 16, 2008.)

Defendants' argument is not that the arbitrator's report is hearsay, but rather that the Court's refusal to admit the report of the arbitrator following the cross-examination of Scott Blissman was prejudicial. Defendants argue that the jury did not fully understand the findings of the arbitrator, as they only heard pieces of the arbitrator's report. On this basis, Defendants argue that the Court's refusal to enter the arbitrator's report into evidence is grounds for a new trial. In contrast, Plaintiff argues that because Defendants initially objected to the introduction of the arbitrator's report, they cannot now base a post-trial motion on the failure to include the exhibit.

Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." FED. R. EVID. 801(c). As held during trial, the report of the arbitrator is hearsay, and it does not fall within any of the exceptions to the hearsay rule. FED. R. EVID. 802, 803, 804. "Hearsay is not admissible except as provided by [the Federal Rules of Evidence] or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress." FED. R. EVID. 802. If a hearsay statement does not fall within the hearsay exceptions enumerated in Rules 803 and 804, it may still be admissible under the residual exception if the statement has "equivalent circumstantial guarantees of trustworthiness" and the court determines that:

(A) the statement is offered as evidence of a

material fact;

(B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and

(C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

FED. R. EVID. 807. But, a statement may not be admitted under the residual exception "unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant." FED. R. EVID. 807. In this case, the report of the arbitrator does not properly fall within the residual exception to the hearsay rule. The "interests of justice" would not be served by permitting a legal decision made by an arbitrator before the jury. The arbitrator made his decision on facts other than those submitted into evidence in this case. It would be unduly prejudicial to place before a jury findings by an arbitrator on a similar issue, when the arbitrator's report is hearsay and based on evidence not in this record. Therefore, the report of the arbitrator does not properly fall within the residual hearsay exception.

Defendants further argue that the Court failed to permit the introduction of the arbitrator's

report after the discussion of the report by the Plaintiff, and that the failure to permit the report into evidence was prejudicial. In support, Defendants cite numerous references to Plaintiff Guarnieri's termination. The references listed by Defendants are:

(1) Plaintiff's examination of Alfred Akulonis (Trial Tr. vol. 1, 57-58, 59, 61, 103, Apr. 14, 2008);

(2) Plaintiff's examination of Ann Dommes (Trial Tr. vol. 1, 113, 140, 168, Apr. 14, 2008);

(3) Plaintiff's examination of Joe Mangan (Trial Tr. vol. 2, 15, Apr. 15, 2008);

(4) Plaintiff's examination of Patrick Wall (Trial Tr. vol. 2, 40, Apr. 15, 2008);

(5) Plaintiff's examination of Plaintiff Guarnieri (Trial Tr. vol. 2, 52, Apr. 15, 2008);

(6) Plaintiff's examination of Mayor Keith Moss (Trial Tr. vol. 2, 104, 105, 169, Apr. 15, 2008);

(7) Plaintiff's cross-examination of Scott Blissman (Trial Tr. vol. 3, 57-60, 68-69, 75, Apr. 16, 2008);

(8) Plaintiff's opening and closing statements.

The Court has reviewed the references to the arbitration report listed by the Defendants. In many cases, Defendants did not object to the testimony on grounds of relevance with respect to testimony

regarding Plaintiff Guarnieri's termination or the arbitration. In some instances, the Defendants themselves raised these issues. In many of the instances where Defendants did object, the Court sustained Defendants' objections, and did not permit the prejudicial evidence into the record. (Trial Tr. vol. 1, 61 Apr. 14, 2008; Trial Tr. vol. 2, 15, 40, 104:10-23, Apr. 15, 2008.) The cross-examination of Scott Blissman included the most discussion regarding the termination of Plaintiff Guarnieri and the subsequent arbitrator's report. (Trial Tr. vol. 3, 47, Apr. 16, 2008.) When Defendants objected to the line of questioning regarding Plaintiff Guarnieri's termination, that objection was sustained. (Trial Tr. vol. 3, 49:14-24, Apr. 16, 2008.) Furthermore, the merits of Plaintiff Guarnieri's termination were not at issue in this case. (Trial Tr. vol. 3, 76:12-19, Apr. 16, 2008.) The fact that the termination and the arbitrator's report were discussed at various points by both Plaintiff and Defendants does not require the arbitrator's report to be entered into evidence.

The refusal of the Court to enter the arbitrator's report into evidence does not constitute a significant error of law that would entitle the Defendants to a new trial. For these reasons, the Court will deny Defendants' motion for a new trial.

XI. Motion for Stay of Proceedings to Enforce Judgment

Defendants have filed a motion to stay the enforcement of the judgment pursuant to Federal Rule of Civil Procedure 62(b). (Doc. 127.) Rule 62(b)

provides that

> [o]n appropriate terms for the opposing party's security, the court may stay the execution of a judgment-or any proceedings to enforce it-pending the disposition of any of the following motions: (1) under Rule 50, for a judgment as a matter of law; (2) under Rule 52(b), to amend the findings or for additional findings; (3) under Rule 59, for a new trial or to alter or amend a judgment; or (4) under Rule 60, for relief from a judgment or order.

FED. R. CIV. P. 62(b). The Order accompanying this Memorandum disposes of all pending motions pursuant to Rules 50 and 59. Therefore, the Court will deny Defendants' request as moot.

CONCLUSION

For the reasons stated above, Defendants' renewed motion for judgment as a matter of law (Doc. 121), motion for a new trial (Doc. 121), and motion to stay enforcement of the judgment (Doc. 127) are denied.

An appropriate Order follows.

September 2, 2008
Date

/s/ A. Richard Caputo
A. Richard Caputo
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CHARLES GUARNIERI, Plaintiff, v. DURYEA BOROUGH, et al., Defendants.	No. 3:05-CV-01422 (JUDGE CAPUTO)

ORDER

NOW, this 2nd day of September, 2008, **IT IS HEREBY ORDERED** that:

(1) Defendants' renewed motion for judgment as a matter of law pursuant to Rule 50 and motion for a new trial (Doc. 121) pursuant to Rule 59 are **DENIED.**

(2) Defendants' motion to stay the enforcement of the judgment pursuant to Federal Rule of Civil Procedure 62(b) (Doc. 127) is **DENIED** as moot.

/s/ A. Richard Caputo
A. Richard Caputo
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CHARLES J. GUARNIERI, JR. Plaintiff, v. DURYEA BOROUGH, et al., Defendants.	Civil Action No. 3:05-CV-01422 (JUDGE CAPUTO)

MEMORANDUM

Presently before the Court is Defendants' Motion for Summary Judgment. (Doc. 39.) For the reasons set forth below, the Defendants' motion will be granted in part and denied in part. Defendants' motion will be granted with respect to the Fourth Amendment claims, which are inapplicable to this case. Defendants' motion will also be granted with respect to the Fourteenth Amendment post-deprivation procedural due process claim, as the Plaintiff received post-deprivation adequate process through the collective bargaining agreement's grievance procedure. Defendants' motion will also be granted

with respect to the Fourteenth Amendment pre-deprivation due process claim, as Plaintiff has failed to demonstrate sufficient evidence of a liberty interest, and the Plaintiff received sufficient process in the post-deprivation hearing. Defendants' motion will be granted with respect to the First Amendment retaliation claim based upon Plaintiff's speech on police and union matters, as Plaintiff has failed to demonstrate sufficient evidence of protected speech. Defendants' motion will be denied with respect to the First Amendment retaliation claim based upon the Plaintiff's filing of the 2003 grievance as questions of material fact exist with respect to this claim. The First Amendment retaliation claim in Count III based upon the right of association will be denied, due to outstanding questions of material fact. Finally, the Court will not address the First Amendment retaliation claim in Count IV, as the Defendants have not moved on that count in their motion.

As a federal question is before the Court pursuant to Title 42 of the United States Code, section 1983, the Court exercises jurisdiction over this action pursuant to section 1331 of Title 28 of the United States Code ("federal question").

BACKGROUND

I. Factual Background

The Plaintiff in this case is Charles J. Guarnieri, Jr., who was appointed Police Chief of Duryea Borough in September of 2000. (Defs.'

Statement of Material Facts in Support of Mot. For Summ. J. ¶ 1, Doc. 40.) Plaintiff was terminated from his position in February of 2003, but reinstated to his position in January of 2005. (*Id.* ¶ 2-3.) Upon his return to work on January 21, 2005, Guarnieri was presented with eleven (11) directives, which he was required to follow as Police Chief of Duryea Borough. (*Id.* ¶ 4.) These directives stated:

1. Your daily shift consists of eight hours. You are not to work more than eight hours per day or more than forty hours per week unless you receive express permission from Borough Council. You are to go home at the end of your eight hour shift.

2. You are not to attend council meetings as the chief of police and will not be paid for attending council meetings. You may only attend as a citizen.

3. You must follow the purchase order system. You personally will be responsible for getting all purchase orders signed for your department.

4. The dayshift officer must observe the arrival and dismissal times of the Holy Rosary School. Hours are 7:45a.m.-8:20a.m. and 2:00p.m.-2:30p.m. This has become a daily practice and must be continued. Any reason that this is not completed must be in writing and included in your weekly written report.

5. You must patrol 4-5 hours during your eight hour shift. Proof of patrol will be a copy of the daily mileage log. Therefore, a copy of the daily mileage log of all shifts must be included with your weekly report to be handed in on Monday.

6. Council will issue directives to the borough secretary and to the borough solicitor. Any borough council directive which you receive from either the borough solicitor or the borough secretary should be treated as a directive of the borough council. Accordingly, you are required to follow any and all directives given to you by borough council, whether directly, or indirectly through the borough secretary or the borough solicitor.

7. You will submit a weekly written report to the borough secretary on the following Monday by 1:00 p.m. This report shall include a detailed description of your daily activities, including the task of patrolling the Holy Rosary bus stop. Proof of your activities shall include the time at which the tasks were performed. In addition, you will include the starting and ending mileage on the patrol vehicle for the time in which you are patrolling.

8. A copy of the monthly schedule for the police department must be given to the borough secretary by the first of the month.

9. The police car is to be used for official business only. Only borough officials and passengers of officials business only are allowed in the police car.

10. The Duryea municipal building is a smoke free building. The police department is not exempt from this smoking ban. Random checks will be done to insure that the building is smoke free. You will be held responsible for your department to adhere to the no smoking regulation.

11. As Chief of Police, you are to work the dayshift, which is Monday through Friday 7:00a.m.-3:00p.m. As your employer, Duryea Borough Council wants our Chief of Police to be visible and accessible to the public during the dayshift hours.

(Pls. Counterstatement to Defs.' Statement of Material Facts, January 21, 2005 Directives, Doc. 42 Ex. A.) Plaintiff then filed a grievance to these directives pursuant to the Collective Bargaining Agreement on January 29, 2005. (Doc. 40 ¶¶ 5-6.) However, Plaintiff's grievance was not resolved through the grievance procedure. (*Id.* ¶ 8.) The grievance then proceeded to Arbitration. (*Id.* ¶ 9.) The arbitrator issued an award with respect to this grievance on February 15, 2006. (*Id.* ¶ 10.) The arbitrator retained jurisdiction for one-hundred and twenty (120) days following his award in order to assist in the implementation of the award. (*Id.* ¶

11.) On or about June 2, 2006, Defendants issued a set of revised directives to Plaintiff. (*Id.* ¶ 12.) On July 3, 2006, the arbitrator issued his final award. (*Id.* ¶ 13.)

II. Procedural Background

On July 18, 2005, Plaintiff filed a Complaint alleging civil rights violations of his First, Fourth, and Fourteenth Amendment rights. (Doc. 1.) The Defendants filed their Answer on August 29, 2005. (Doc. 8.) The Plaintiff then filed an Amended Complaint on December 21, 2006. (Doc. 28.) On December 29, 2006, the Defendants filed their Answer to the Amended Complaint. (Doc. 43.) Defendants filed the present Motion for Summary Judgment on December 22, 2006. (Doc. 39.) This motion is fully briefed and ripe for disposition.

LEGAL STANDARD

Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). A fact is material if proof of its existence or nonexistence might affect the outcome of the suit under the applicable substantive law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

Where there is no material fact in dispute, the moving party need only establish that it is entitled

to judgment as a matter of law. Where, however, there is a disputed issue of material fact, summary judgment is appropriate only if the factual dispute is not a genuine one. *See id.* at 248. An issue of material fact is genuine if "a reasonable jury could return a verdict for the nonmoving party." *Id.*

Where there is a material fact in dispute, the moving party has the initial burden of proving that: (1) there is no genuine issue of material fact; and (2) the moving party is entitled to judgment as a matter of law. *See* CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 2727 (2d ed.1983). The moving party may present its own evidence or, where the nonmoving party has the burden of proof, simply point out to the Court that "the nonmoving party has failed to make a sufficient showing of an essential element of her case . . . ." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

All doubts as to the existence of a genuine issue of material fact must be resolved against the moving party, and the entire record must be examined in the light most favorable to the nonmoving party. *See White v. Westinghouse Elec. Co.*, 862 F.2d 56, 59 (3d Cir. 1988). Once the moving party has satisfied its initial burden, the burden shifts to the nonmoving party to either present affirmative evidence supporting its version of the material facts or to refute the moving party's contention that the facts entitle it to judgment as a matter of law. *See Liberty Lobby*, 477 U.S. at 256-57.

The Court need not accept mere conclusory allegations, whether they are made in the complaint or a sworn statement. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888 (1990). In deciding a motion for summary judgment, "the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Liberty Lobby*, 477 U.S. at 249.

DISCUSSION

Plaintiff alleges that Defendants violated section 1983, which provides:

> Every person who, under color of any statute, ordinance, regulation, custom or usage . . . subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . . .

Plaintiff further alleges that Defendants are liable under Section 1983 for violations of their [sic] constitutional rights under the First Amendment, Fourth Amendment, and Fourteenth Amendment based upon their actions under color of law.

I. Fourth Amendment Claim

In the statement of jurisdiction, Plaintiff alleges violations of the "First, Fourth and

Fourteenth Amendments" to the United States Constitution. (Am.Compl. ¶ 15, Doc. 38.) The Fourth Amendment to the United States Constitution, which protects against unreasonable searches and seizures, has no applicability to this case.

II. Count I - Fourteenth Amendment Due Process

In Count I of the Amended Complaint, Plaintiff Guarnieri alleges that he was denied both pre-deprivation and post-deprivation process pursuant to the Fourteenth Amendment. To establish a cause of action for a procedural due process violation, Plaintiff must first prove that a person acting under color of state law deprived him of a protected property or liberty interest; and second, he must show that the procedures available to him failed to provide him with due process of law. *See, Alvin v. Suzuki*, 227 F.3d 107, 116 (3d Cir. 2000).

A. Post-Deprivation Process

The Third Circuit Court of Appeals has repeatedly held that, "in cases in which 'a due process claim is raised against a public employer, and grievance and arbitration procedures are in place, . . . those procedures satisfy due process requirements 'even if the hearing conducted by the Employer . . . [is] inherently biased .'" *Leneny v. City of Pittsburgh*, 183 F.3d 220, 228 (3d Cir. 1999) (quoting *Dykes v. Southeastern Pa. Trans. Auth.*, 68

F.3d 1564, 1571 (3d Cir. 1995)). Thus, "[i]n order to state a claim for failure to provide due process, a plaintiff must have taken advantage of the processes that are available to him or her, *unless* those procedures are unavailable or patently inadequate." *Alvin*, 227 F.3d at 116 (emphasis added).

In response to the January 21, 2005, Plaintiff Guarnieri elected to file a grievance pursuant to the Collective Bargaining Agreement, and proceeded through the grievance process to arbitration. Therefore, post-deprivation process was both available and utilized. Plaintiff has presented no evidence that the arbitration proceedings were inadequate. Furthermore, although violations of post-deprivation process are alleged in the Plaintiff's Amended Complaint, the Plaintiff states in his brief that he is not seeking a claim for post-deprivation due process. Therefore, Defendants' motion for summary on the post-deprivation due process claim will be granted.

B. Pre-Deprivation Process

Plaintiff also alleges that he was denied constitutionally required pre-deprivation procedures pursuant to the Fourteenth Amendment. To establish a cause of action for a pre-deprivation procedural due process violation, the Plaintiff must prove both that a person acting under color of state law deprived him of a protected property or liberty interest; and that the procedures available to him failed to provide him with due process of law. *See, Alvin v. Suzuki*, 227 F.3d 107, 116 (3d Cir. 2000).

1. Property Interest

"Property interests are not created by the Constitution, 'they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538 (1985). In Pennsylvania, police forces are protected under the Police Tenure Act, 53 P.S. § 811 *et seq.* (protecting police forces of less than three full-time officers) and the section on Civil Service for Police and Firemen, 53 P.S. § 46171 *et seq.* (protecting police forces of three full-time officers or more), both of which provide extensive procedural protections to a police officer. The section on Civil Service for Police and Firemen states that "[n]o person shall hereafter be suspended, removed or reduced in rank as a paid employee in any police force, except in accordance with the provisions of this subdivision." 53 P.S. § 46171. Similarly the Police Tenure Act on removals states that "No person employed as a regular full time police officer . . . shall be suspended, removed or reduced in rank except for the following reasons . . . ." 53 P.S. § 812. Furthermore, both sections create the right to demand a public hearing upon suspension or dismissal and the right to appeal the results of a public hearing to the Pennsylvania Court of Common Pleas. 53 P.S. § 814, 815, 46191. The Civil Service Act also creates the right to request a hearing in the event of a reduction in rank. 53 P.S. § 46191. In this case, the reinstatement of the Plaintiff created a third full-time officer, but the furlough of another officer reduced the force to two

full-time officers. However, it is irrelevant as to which code section applies. Both sections guarantee that a police officer may not be suspended, removed, or reduced in rank except for cause. Since "federal constitutional standards rather than state statutes define the requirements of procedural due process," the state law provisions are irrelevant. *Robinson v. Via*, 821 F.2d 913, 923 (2d Cir. 1987).

The Plaintiff also alleges a property interest which arises from the Collective Bargaining Agreement. Plaintiff cites numerous articles within the agreement, which create a potential property interest. For example, Article 17 acts similarly to the Police Tenure Act, and states that

> No full time police officer covered by this agreement shall be discharged, suspended or demoted except for "just cause" as defined in the civil service provisions of the Pennsylvania Borough Code (53 p.s. Section 46190). It is understood and agreed that *ALL* matters of discipline will be determined through a grievance procedure established by *Article 16* of the current Collective Bargaining Agreement.

(Collective Bargaining Agreement between Duryea Borough and The Duryea Borough Police Department, January 1, 2004 through December 31, 2005, Art. 17, Doc. 47 at 21.) Therefore, a property interest may arise through a reduction in rank or demotion within the bounds of the Collective Bargaining Agreement, as well as within the ambit of state law. Plaintiff's potential property interest is

an interest in his employment and rank as chief of police.

The Court must first consider whether a "reduction in rank" or "demotion" occurred to determine if a property interest exists, and secondly consider whether a hearing is required by federal procedural due process standards. For a property interest to exist, the actions by the Defendants must be a "reduction in rank" or "demotion," as provided by state law. Thus, the Court must determine if the January 21, 2005 directives created a constructive demotion or reduction in rank. The Third Circuit Court of Appeals has considered whether a property interest may be implicated by a constructive demotion based upon the Police Tenure Act. *See Clark v. Twp. of Falls*, 890 F.2d 611, 617 (3d Cir. 1989). In *Clark*, the plaintiff was a police officer who received a change in duties. *Id.* 615-16. The Plaintiff was also issued a number of directives by the Township. *Id.* at 616.

The Third Circuit Court of Appeals noted that an actual rank reduction would be effectuated by a change in title. *Id.* at 618. A constructive reduction in rank would require other traditional indicia of change of rank to determine if a constructive reduction occurred. *Id.* Such indicia include a change in pay, the imposition of duties normally given to employees of lower rank, substantially reduced responsibilities, termination of privileges of rank, and whether the changes were temporary or permanent. *Id.* The court held that the officer did not suffer a constructive demotion, as the changes

were only effective for six (6) weeks. Furthermore, the officer retained numerous police duties. *Id.*

Plaintiff Guarnieri retained his rank as Chief of Police during the relevant time, and therefore did not suffer an actual demotion or reduction in rank. Furthermore, the Plaintiff has not presented evidence that he received a reduction in pay, outside of the denial of overtime opportunities. In any event, the Police Tenure Act does not create a right to overtime opportunities.

The Plaintiff was assigned numerous duties and changes in responsibilities by the January 21, 2005 directives. These duties included: (1) only working and eight hour shift; (2) not being permitted to attend council meetings as a police chief; (3) following the purchase order system; (4) observing arrival and dismissal at a local school; (5) patrolling for four (4) to five (5) hours per day and logging the patrols; (6) submitting a weekly report of daily activities; (7) giving the police department monthly schedule to the borough secretary; (8) only using the police car for official business; (9) monitoring the Duryea municipal building for the no smoking violation; (10) and only being permitted to work the day shift. (January 21, 2005 Directives, Doc. 42 Ex. A)

These directives were a change in procedure from the Plaintiff's previous employment, and differed from the procedure and practice applicable to other officers and previous police chiefs. The Plaintiff was previously present at Borough

meetings prior to his termination, and had a name tag for questions. (Guarnieri Dep. 122: 9-22, Apr. 27, 2006, Doc. 45 Ex. 15.) Only after his return was he restricted from speaking at Borough meetings in his capacity as police chief. If he attended the meetings, the Plaintiff was restricted from answering any questions posed by the citizens. (Guarnieri Dep. 32: 3-11, Doc. 45 Ex. 15.) The Plaintiff also testified that from common knowledge, he knew that his department was the only department required to follow the purchase order system. (Guarnieri Dep. 32:18-24, Doc. 45 Ex. 15.) As for the monitoring of the arrival and dismissal of the local school, the Plaintiff stated that this was not a practice when he was previously employed with the police department. (Guarnieri Dep. 34: 1-9, Doc. 45 Ex. 15.) Although some officers did monitor the school when he could, he was not ordered or directed to do so. (Guarnieri Dep. 35: 21-24, Doc. 45 Ex. 15.) The Plaintiff testified that a police chief has numerous administrative duties, and may not ever patrol. (Guarnieri Dep. 123:3-13, Doc. 45 Ex. 15.) He further testified that no officer had ever been required to do a daily mileage log or weekly report. (Guarnieri Dep. 37: 11-17, Doc. 45 Ex. 15.) The Plaintiff also testified that he personally had never been required to write a written report when previously acting as police chief. (Guarnieri Dep. 113: 4-12, Doc. 45 Ex. 15.) Nor were any officers of lower rank required to fill out such a written report. (Guarnieri Dep. 113: 4-12, Doc. 45 Ex. 15.) Plaintiff similarly testified with respect to the reports to be turned in to the borough secretary. (Guarnieri Dep. 39: 13-24, Doc. 45 Ex. 15.) Furthermore, the

Plaintiff testified that the officer acting as the police chief prior to his return was not restricted to the day shift. (Guarnieri Dep. 47:23-48:13, Doc. 45 Ex. 15.)

Accordingly, these directives changed the Plaintiff's responsibilities and requirements. Furthermore, the January 21, 2005 directives appear to be a permanent addition to the Plaintiff's responsibilities. The Plaintiff testified that other police officers were not similarly restricted.

Such a change in responsibilities may constitute a constructive demotion as per *Clark*. The Court is of the opinion that such a change in responsibilities probably did not create a constructive demotion or reduction of rank. However, even if such actions did constitute a constructive demotion or change in rank, the Plaintiff would not be entitled to a pre-deprivation hearing based upon the three-step balancing test for determining violations of due process.

Presuming the Plaintiff has demonstrated a cognizable property interest, he must satisfy the three-step balancing test as to whether the deprivation occurred without due process of law. The factors to be weighed are:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's

> interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

In this case, the Plaintiff's private interest is an interest in the duties and responsibilities of his job. This interest is relatively insubstantial compared to other employment-related private interests. For example, the employee in *Loudermill* faced termination. 470 U.S. at 538. Similarly, the Supreme Court noted that a temporary suspension without pay is an insubstantial deprivation compared to the termination of *Loudermill*. *Gilbert v. Homar*, 520 U.S. 924, 932 (1997). Plaintiff's deprivation in this case is even less substantial than a temporary suspension without pay. The Plaintiff here only faced a change in responsibilities. He retained many of his duties, and continued to receive payment for his employment. The Court in *Gilbert* noted that so long as the employee received a sufficiently prompt post-deprivation hearing, the lost income of a suspension would be insubstantial. *Id.* Under the reasoning of *Gilbert*, if the Plaintiff here received a prompt post-deprivation hearing, the loss of duties would be insubstantial.

In comparison, the Government has an interest in determining the duties and responsibilities of its employees. The process currently afforded to the Plaintiff is one of post-deprivation process pursuant to the grievance

procedure of the Collective Bargaining Agreement. The additional process requested by the Plaintiff would be a pre-deprivation hearing prior to the issuance of any directives involving a change in duties or responsibilities. However, there would be numerous fiscal and administrative burdens on the government if there was an additional, pre-deprivation hearing any time changes to an officer's duties occurred. Such a requirement would be burdensome and unnecessary. The Supreme Court specifically stated that due process does not always require a prior hearing. *Id.* at 930. The Court farther held that "where it would be impractical to provide pre-deprivation process, post-deprivation process satisfies the requirements of the Due Process Clause." *Id.* (citations omitted).

The final factor requires the Court must consider the risk of erroneous deprivation. By comparison to *Loudermill* and *Gilbert*, the purpose of such a hearing would be to assure that there are reasonable grounds to support the change in the Plaintiff's duties and responsibilities. *See Gilbert*, 520 U.S. at 933-34. The Plaintiff received prompt post-deprivation process, and therefore the risk of erroneous deprivation was low.

In weighing the factors to determine whether due process of law would be satisfied by a pre-deprivation hearing, the Court holds that such a hearing is unnecessary. The Plaintiff received a post-deprivation hearing in the form of an arbitration pursuant to the grievance procedure of the collective bargaining agreement. A pre-

deprivation hearing is unnecessary because the Plaintiff's interest is insubstantial, the government's interest is important, the burden on the government to provide a prior hearing would be great, and a prompt post-deprivation hearing satisfies the requirements of procedural due process.

2. Liberty Interest

"An employment action implicates a fourteenth amendment liberty interest only if it (1) is based on a 'charge against [the individual] that might seriously damage his standing and associations in the community . . . , for example, that he had been guilty of dishonesty, or immorality' or (2) 'imposes on him a stigma of other disability that foreclosed his freedom to take advantage of other employment opportunities'" *Robb v. City of Philadelphia*, 733 F.2d 286, 293-94 (3d Cir. 1984) (quoting *Bd. of Regents v. Roth*, 408 U.S. 564, 573 (1972)). "Stigma to reputation alone, absent some accompanying deprivation of present or future employment, is not a liberty interest protected by the fourteenth amendment." *Id.* Thus, in the public employment context, "a plaintiff must show a stigma to his reputation *plus* deprivation of some additional right or interest." *Hill v. Borough of Kutztown*, 455 F.3d 225, 236 (3d Cir. 2006) (quoting *Codd v. Velger*, 429 U.S. 624, 628 (1977)). It is required that the Plaintiff satisfy the "stigma-plus" test in order to successfully demonstrate a liberty interest pursuant to the Fourteenth Amendment.

Plaintiff has stated that he has suffered injury

to his reputation. Plaintiff Guarnieri testified that the January 21, 2005 directives created a stigma to his reputation by assigning him duties consistent with officers of a lower rank. (Guarnieri Dep. 87: 1-6; 88:6-10, Doc. 45 Ex. 15.) At his deposition, Plaintiff Guarnieri discussed that these directives effected his reputation among his fellow officers, as well as with the citizens of Duryea. (Guarnieri Dep. 49:19-51:14, Doc. 45 Ex. 15.) For example, the directives forbid Plaintiff from participating at board meetings as the Chief of Police. (Guarnieri Dep. 31:23-32:11, Doc. 45 Ex. 15.) Thus, the Chief's standing with the community was affected by his inability to communicate with the public in his official capacity at meetings, when he was formerly able to do so. (Guarnieri Dep. 31:23-32:11, Doc. 45 Ex. 15.)

Furthermore, to state a claim for stigma, the plaintiff must demonstrate that the stigmatizing information was 'published' or otherwise disseminated by the public employer to the public at large. *Hill*, 455 U.S. at 236. At this time, evidence has not been presented that the board publicly announced these directives.

The demonstration of damage to reputation alone is insufficient to make out a claim for deprivation of liberty. Even presuming these directives were made public by the Defendants, the reputational injury must be in addition to a "plus" factor. *Hill*, 455 F.3d at 236. In *Edwards v. California University of Pennsylvania*, 156 F.3d 488, 492 (3d Cir. 1998), the Third Circuit Court of

Appeals considered the potential liberty interest of a college professor who was temporarily removed from the classroom setting. The court held that "[s]ince it is undisputed that [the plaintiff] remained employed with pay at all times relevant to this case, his claim is barred by decisions in *Robb* and *Sturm*. While [the plaintiff's] temporary removal from class duties may have further stigmatized him, this action does not constitute a deprivation of employment." *Id.* Thus, the plaintiff's removal from classroom duties did not satisfy a liberty interest. *Id.*

Furthermore, in *Kelly v. Borough of Sayreville, N.J.*, 107 F.3d 1073, 1078 (3d Cir. 1997), the Third Circuit Court of Appeals held that the plaintiff police officer did not demonstrate a liberty interest beyond injury to reputation, as he maintained his official rank. The plaintiff officer argued that he lost potential future employment opportunities due to this reputational injury, which would satisfy the "plus" factor. *Id.* However, the court held that "'possible loss of future employment opportunities is patently insufficient to satisfy the requirement . . . that a liberty interest requires more than mere injury to reputation.'" *Id.* (quoting *Clark v. Twp. of Falls*, 890 F.2d 611, 620 (3d Cir. 1989)).

The Plaintiff has failed to demonstrate evidence of a "plus" factor beyond the injury to his reputation. The Plaintiff maintained his official rank and pay at all times. Therefore, the Plaintiff did not suffer a liberty interest requiring a hearing for the purposes of due process. Even if the Plaintiff did suffer the deprivation of a liberty interest, the

Plaintiff's procedural rights would have been met by the post-deprivation hearing, as stated previously.

Therefore, as there is no material question of fact, and as the Defendants are entitled to summary judgment as a matter of law, the Defendants' motion will be granted as to Count I.

III. Count II - First Amendment Retaliation - Petition and Speech

A Right to Speech

Plaintiff alleges in his Amended Complaint that he engaged in speech relating to "Police and Union matters with Defendants once he was finally reinstated." (Am.Compl.¶ 33, Doc. 38.) To properly allege an action for retaliation based on the First Amendment speech, a public employee must satisfy three elements: (1) the speech was protected and involved a matter of public concern, *Connick v. Myers*, 461 U.S. 138, 147 (1983); (2) the plaintiff's interest in the speech outweighs the state's interest in "promoting the efficiency of the public service it performs," *id.* at 142 (citing *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968)); and (3) the protected speech was a substantial or motivating factor in the retaliation. *Czurlanis v. Albanes*, 721 F.2d 98, 103 (3d Cir. 1983). The public employer can rebut the claim by demonstrating the same decision would be reached even in the absence of the protected speech. *Id.* at 102.

"A public employee's speech involves a matter

of public concern if it can be 'fairly considered as relating to any matter of political, social or other concern to the community.'" *Baldassare v. State of New Jersey*, 250 F.3d 188, 195 (3d Cir. 2001). Such an inquiry requires the court to consider the content, form, and context of the speech. *Id.* "The content of the speech may involve a matter of public concern if it attempts 'to bring to light actual or potential wrongdoing or breach of public trust on the part of government officials.'" *Id.* (quoting *Holder v. City of Allentown*, 987 F.2d 188, 195 (3d Cir. 1993)).

Plaintiff has failed to present evidence regarding the content, form, or context of the speech. Although the Plaintiff alleges that the speech relates to "Police and Union matters," and that speech occurred after the reinstatement, there is no evidence presented regarding when the speech occurred, the forum where the speech occurred, the recipients of the speech, or the specific content of the speech. Nor does the Plaintiff present evidence as to whether the speech was made with respect to his duties as a public official, or as a private citizen. *Compare Baldassare*, 250 F.3d at 196 (finding that a public employee's speech was protected when made with respect to his official duties because it brought to light a specific wrongdoing on the part of government officials) *with Morris v. Crow*, 142 F.3d 1379 (11th Cir. 1998) (holding that speech made with respect to a public official's duties is not protected when the speech did not bring to light wrongdoing on the part of government officials).

Evidence of speech has been presented in the

form of letters written to the Borough Council in 2002, prior to the Plaintiff's termination and the 2003 grievance. However, this speech would be insufficient to present a First Amendment retaliation claim. These letters were written almost three (3) years prior to the January 21, 2005 directives, and therefore, no reasonable juror would be able to find there was causation between the 2002 letters and the 2005 directives. Therefore, the Court will grant the Defendants' motion for summary judgment on Count II's claim for a violation of Plaintiff's freedom of speech.

B. Right to Petition

To establish a First Amendment retaliation claim based upon the right to petition by a public employee, the Court must employ a three-part inquiry. First, the Plaintiff has the burden of establishing that the activity is protected by the First Amendment. *San Filippo v. Bongiovanni*, 30 F.3d 424, 430-31 & n. 7 (3d Cir. 1994), *cert. denied*, 513 U.S. 1082 (1995). Second, the Plaintiff must establish that the protected activity was a substantial factor in the alleged retaliation. *Id.* In order to constitute retaliation within the meaning of the second prong, the action must be sufficient to deter a person of ordinary firmness from exercising his First Amendment rights. *Thomas v. Independence Township*, 463 F.3d 285, 296 (3d Cir. 2006). To succeed on this second prong, Plaintiff does not have to show "but-for" causation; rather, he must show only that "the exercise of [his] First Amendment rights played some substantial role in

the relevant decision." *Suppan v. Dadonna*, 203 F.3d 228, 236 (3d Cir. 2000).

If Plaintiff satisfies the first two prongs of the inquiry, the burden of persuasion shifts to the defendant, who "may defeat plaintiff's claim by demonstrating that the same action would have taken place even in the absence of the protected conduct." *San Filippo*, 30 F.3d at 430-31 & n.7. This framework is borrowed from *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, in which the defendant must demonstrate the third prong by a preponderance of the evidence. *See* 429 U.S. 274, 287 (1977).

1. Protected Activity

The First Amendment's Petition Clause protects a public employee from retaliation for filing non-sham lawsuits, grievances, and other petitions directed at the government or its officials. *See San Filippo v. Bongiovanni*, 30 F.3d 424, 439 (3d Cir. 1994), *cert. denied*, 513 U.S. 1082, 115 S.Ct. 735, 130 L.Ed.2d 638 (1995). The filing of a formal petition is protected without regard to whether the petition addresses a matter of public concern. *Id.* at 442. Such a petition is protected as long as it is filed in good faith, and the petition is not a sham. *Id.* Formal mechanisms include a collective bargain agreement's grievance procedure, as noted in *San Filippo*. *Id.* at 442. There is no evidence presented that Plaintiff's 2003 grievance pursuant to the collective bargaining agreement was a "sham." As a good faith grievance pursuant to a collective bargaining agreement has specifically been protected

within the meaning of the Petition Clause by the Third Circuit Court of Appeals in *San Fillipo*, Plaintiff has presented sufficient evidence of a protected activity.

2. Ordinary Firmness and Substantial Factor

The second element considers whether the alleged retaliatory actions were sufficient to deter a person of ordinary firmness from exercising his First Amendment rights. *Thomas v. Independence Township*, 463 F.3d 285, 296 (3d Cir. 2006). "The effect of the alleged conduct on the employee's freedom of speech need not be great in order to be actionable, but it must be more than *de minimus*." *McKee v. Hart*, 436 F.3d 165, 170 (3d Cir. 2006) (internal quotation marks omitted). However, "[e]ven 'an act of retaliation as trivial as failing to hold a birthday party for a public employee,' if 'intended to punish her for exercising her free speech rights,' may be actionable if sufficient 'to deter a person of ordinary firmness' from exercising his or her First Amendment rights." *O'Connor v. City of Newark*, 440 F.3d 125, 127 (3d Cir. 2006) (quoting *Suppan v. Dadonna*, 203 F.3d 228, 234-35 (3d Cir. 2000) (citing *Rutan v. Republican Party*, 497 U.S. 62, 76 n. 8 (1990)). The Third Circuit Court of Appeals further held that the threshold for a First Amendment retaliation claim is very low and "a cause of action is supplied by all but truly de minimus violations." *Id.* (citing *Suppan*, 203 F.3d at 234-35).

The retaliatory act alleged to Plaintiff's filing of the 2003 grievance includes the issuance of the January 21, 2005 directives. Plaintiff also testified that the Defendants retaliated against him by creating barriers to his receiving health and life insurance for his wife. In Defendants' brief, they argue that the January 21, 2005 directives did not deter Guarnieri from exercising his First Amendment rights, and that Guarnieri did in fact file a second grievance challenging the directives eight (8) days after their issuance. However, Defendants misconstrue the "ordinary firmness" standard. The standard applied for First Amendment retaliation is an objective standard dealing with a person of ordinary firmness, and does not consider the firmness of the particular Plaintiff. The question is whether a person of ordinary firmness would be deterred from further exercising his or her right to petition pursuant to the collective bargaining agreement.

There is a question of material fact as to whether a set of directives such as these would deter a person of ordinary firmness from exercising his rights under the collective bargaining agreement. A reasonable factfinder could determine that the January 21, 2005 directives were sufficient "to deter a person of ordinary firmness" from exercising his First Amendment rights, and therefore summary judgment is inappropriate at this time.

Similarly, there is a question of material fact as to whether barriers to receiving health and life insurance policies for a spouse would deter a person

of ordinary firmness from exercising his First Amendment rights. Plaintiff testified that the Borough refused to accept his marriage license, which created problems with his insurance. (Guarnieri Dep. 116: 8-21, Doc. 45 Ex. 15.) He further testified that no other officer was required to provide a copy of their marriage license. (Guarnieri Dep. 116: 8-21, Doc. 45 Ex. 15.) A reasonable factfinder could determine that barriers to receiving his health and life insurance were sufficient "to deter a person of ordinary firmness" from exercising his First Amendment rights, and therefore summary judgment is inappropriate at this time.

Furthermore, the second prong of the First Amendment retaliation inquiry requires the Plaintiff to demonstrate that the 2003 grievance was a substantial factor in the issuance of the January 21, 2005 directives. Defendants claim that the Arbitrator already determined the purpose of the January 21, 2005 directives, and therefore the 2003 grievance procedure cannot be a substantial factor.

However, the Supreme Court held in *McDonald v. City of West Branch, Michigan*, 466 U.S. 284 (1984), that federal courts are not obligated to accord res judicata or collateral estoppel to an arbitrator's decision. In *McDonald*, the plaintiff police officer brought a grievance through the collective bargaining process after his termination. *Id.* at 285-86. The arbitrator ruled against McDonald, but he did not appeal the decision. *Id.* at 286, 287. Rather, he filed a § 1983 action for violations of his First Amendment rights. *Id.* at 287.

The Court then considered whether the arbitration pursuant to the collective bargaining agreement obligated the federal court to apply res judicata or collateral estoppel to the § 1983 claims. The Supreme Court defined collateral estoppel, holding that when a "court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case.'" *Id.* at 287 n. 5 (quoting *Allen v. McCurry*, 449 U.S. 90, 94 (1980)).

The Court noted that "arbitral fact-finding is generally not equivalent to judicial factfinding," and therefore "in a § 1983 action, an arbitration proceeding cannot provide an adequate substitute for a judicial trial." *Id.* at 291, 292. Thus, the Court held that

> according preclusive effect to arbitration awards in § 1983 actions would severely undermine the protection of federal rights that the statute is designed to provide. Therefore, we hold that in a § 1983 action, a federal court should not afford res judicata or collateral estoppel to effect an award in an arbitration proceeding brought pursuant to the terms of a collective bargaining agreement.

Id. The Defendants argue in their brief that the January 21, 2005 directives were not a substantial factor, as the arbitrator found that "the two (2) main reasons for the Borough issuing directives . . . were

for: (a) financial reasons . . . and (b) operational reasons." (In the Matter of the Arbitration between Duryea Borough Police Department and Borough of Duryea, AAA Case No. 14 300 00419 05 RVB, Implementation of Award, Doc. 40 Ex. B at 2-3.) Essentially, Defendants argue that collateral estoppel exists as to the rationale for the January 21, 2005 directives, and therefore the 2003 grievance cannot be a substantial factor. However, the Supreme Court does not permit collateral estoppel based upon arbitration pursuant to a collective bargaining agreement. Although the arbitrator "'decided an issue of fact or law necessary to its judgment,' "this decision does not preclude this Court from considering the rationale behind the January 21, 2005 directives, as a collective bargaining agreement's arbitration does not create collateral estoppel for a later § 1983 claim. *McDonald*, 466 U.S. at 287 n.5 (quoting *Allen v. McCurry*, 449 U.S. 90, 94 (1980)).

To succeed on the substantial factor element, Plaintiff does not have to show "but-for" causation. *Suppan*, 203 F.3d at 236. Defendants Dommes and Morreale testified that the council fought hard against Plaintiff Guarnieri in his 2003 grievance. (Dommes Dep. 48:5-8, Apr. 28, 2006, Doc. 45 Ex. 13; Morreale Dep. 36:6-37:16, Apr. 28, 2006, Doc. 45 Ex. 12.) Furthermore, Defendant Morreale further stated that she was of the opinion that the council was not in favor of Plaintiff Guarnieri returning. (Morreale Dep. 36:21-37:2, Doc. 45 Ex. 12.) Furthermore, deposition testimony by Mayor Keith Moss reflects his belief that the directives were

issued "Because of him filing the grievance and that, and that he won his job back. I think they just wanted to do something to him." (Moss Dep. 11:3-7, July 18, 2006, Doc. 45 Ex. 17.) Plaintiff Guarnieri received the January 21, 2005 directives on the first day of his return after the 2003 grievance procedure. (Guarnieri Dep. 22:11-18, Doc. 45 Ex. 15.) Furthermore, these directives were only issued to Plaintiff Guarnieri, and the other officers were not issued similar directives. (Guarnieri Dep. 39:13-24, Doc. 45 Ex. 15.) Therefore, there is question of material fact as to whether the protected activity was a substantial or motivating factor in issuance of the January 21, 2005 directives.

Similarly, there is a question of material fact as to whether the barriers to receiving health and life insurance were caused in retaliation for the Plaintiff's actions. There is a question of material fact as to whether Plaintiff's actions were a substantial factor in the alleged retaliation. A reasonable factfinder could hold that the Defendants created barriers to receiving life and health insurance in retaliation for Plaintiff's actions.

3. Same Action in Absence of Protected Conduct

After consideration of the first two elements of the retaliation test, the burden of persuasion shifts to the defendant, who "may defeat plaintiff's claim by demonstrating that the same action would have taken place even in the absence of the protected conduct." *San Filippo*, 30 F.3d at 430-31 & n.7.

The Defendants suggest in their brief that the directives were "reasonably related to the legitimate goals that it was attempting to accomplish and that they were within its rights as an employer." (Defs.' Brief in Supp. of Mot. for Summ. J. at 14, Doc. 41.) Thus, Defendants argue that the directives would have been issued even in the absence of the Plaintiff's petition. For example, Defendant Morreale testified in her deposition that the Chief's overtime was limited in Directive 1 because "financially, they were spending more money than was budgeted for the salaries, so it created a budget problem." (Morreale Dep. 43: 13-15.) As to Directive 2, Morreale similarly opined that Plaintiff was restricted from attending the council meetings as chief of police because "I think council felt that sometimes the meetings run a couple of hours and there was no involvement on [Chief Guarnieri] and we were trying to save money." (Morreale Dep. 164:25-165:3.) In Directive 3, Plaintiff was required to follow the purchase order system. Defendant Morreale noted that the Street Department had a purchase order policy procedure, which it followed from the time of the institution of the purchase order procedure. (Morreale Dep. 42:17-43:12.) She further testified that she believed that Plaintiff Guarnieri received a copy of the purchase order policy. (Morreale Dep. 42: 11-15.) Furthermore, Morreale testified that Plaintiff was not the only department head required to get signed purchase orders, stating that "Each department head was responsible personally to get the purchase orders signed, and they were just telling him that in writing in the

directives when he came back." (Morreale Dep. 171: 10-13.) Directive 4 required that Plaintiff go to Holy Rosary School at the arrival and dismissal of the school day. In response to questioning on this directive, Defendant Morreale testified that

> We had had some problem with the truck traffic on Stephenson Street, and we had a letter at a council meeting about the safety of the children at the Holy Rosary School. And the officer in charge had gone done there every day, and the people at the school appreciated it so they just wanted the chief to know and they wanted the practice to continue.

(Morreale Dep. 172:25-173:7.) Defendant Morreale also testified as to the rationale for Directive 5, requiring the Plaintiff to patrol for four (4) to five (5) hours per day. She noted that "while [Plaintiff] was off, the officer in charge patrolled a lot and people liked seeing the police car and they wanted him visible to the public." (Morreale Dep. 175: 14-16.)

Defendant Dommes also testified as to the rationale behind the directives. She testified that

> we knew we had a problem with Chief Guarnieri following orders. Prior to his termination he would not listen to myself, to the borough secretary, to the solicitor . . . [our solicitor] said you can put directives to him in order for him to-for it to be clear what [us] as employers want him to do as an

employee.

(Dommes Dep. 95:23-96:5.)

Therefore, the Defendants have presented some evidence demonstrating that same action would have taken place even in the absence of the protected conduct, in the case of at least some of the directives. However, there is a question of material fact as to whether the actions would have taken place in the absence of Plaintiff's petition. Viewing this evidence in the light most favorable to Plaintiff, the Court concludes that there are issues of material fact as to whether that [sic] the alleged activity would deter a person of ordinary firmness, if the protected activity was a substantial factor in the alleged retaliation, and if the same action would have occurred in the absence of the protected conduct. Because of the factual disputes surrounding the second and third prong, Defendants' motion for summary judgment on Count II's violation of the right to petition will be denied.

IV. Count III - First Amendment Retaliation - Association

Plaintiff further alleges that the Defendants violated his First Amendment rights by retaliating against him for his affiliation with the union, the Fraternal Order of Police, and his assistance in union matters. In order to show a violation of Plaintiff's right to freedom of association, Plaintiff Guarnieri must prove that the Borough retaliated against him because of his union activities.

To properly allege an action for associational retaliation, a public employee must satisfy three elements: (1) that plaintiff engaged in conduct or speech protected by the First Amendment; (2) that the government responded with retaliatory action sufficient to deter a person of ordinary firmness from exercising his First Amendment rights; and (3) that the protected activity caused the retaliation. *Thomas v. Independence Township*, 463 F.3d 285, 296 (3d Cir. 2006).

A Protected Activity

Union membership is protected by the right to association within the First Amendment. *Service Employees Int'l Union, AFL-CIO v. County of Butler, Pa.*, 306 F.Supp. 1080, 1082 (W.D.Pa. 1969) (citing *Thomas v. Collins*, 323 U.S. 516 (1945)). The Supreme Court has

> recognized that "one of the foundations of our society is the right of individuals to combine with other persons in pursuit of a common goal by lawful means," *NAACP v. Clairborne Hardware Co.*, 458 U.S. 886, 933 (1982), and our recognition of this right encompasses the combination of individual workers together in order [to] better assert their lawful rights. *See e.g. Railroad Trainmen v. Virginia*, 377 U.S. 1, 5-6 (1964).

Lyng v. Int'l Union, United Automobile, Aerospace and Agricultural Implement Workers of America,

UAW, 485 U.S. 360, 364 (1988).

At this time, a circuit split exists regarding whether the protected activity also must be a matter of public concern to satisfy the first element when the protected activity is association. *See Sanguini v. Pittsburgh Bd. of Public Educ.*, 968 F.2d 393 (3d Cir. 1992). In *Sanguini*, the Third Circuit Court of Appeals acknowledged the circuit split, but declined to decide whether *Connick* applied to freedom of association cases. *Id.* at 400 (noting that the Sixth and Seventh Circuit Courts of Appeals apply the *Connick* test to freedom of association, but that the Eleventh Circuit Court of Appeals refused to do so).

In *Van Compernolle v. City of New Zealand*, No. 06-1904, 2007 WL 2015985, at *7 (6th Cir. July 9, 2007), the Sixth Circuit Court of Appeals discussed *Boals v. Gray*. The court recognized that in *Boals*, there was " 'no doubt that an employee who is disciplined solely in retaliation for his membership in and support of a union states a valid First Amendment claim under *Connick* and *Pickering*.' " *Id.* (quoting *Boals*, 775 F.2d at 693). The court further addressed the difference between being a union member and acting or speaking as one. *Id.* The court thus distinguished the two, stating that "while a government employer cannot take adverse action against an employee solely because that employee is a union member, the First Amendment does not protected union-related speech . . . unless that speech . . . addresses a matter of public concern." *Id.* (citing *Boals*, 775 F.2d at 693).

Mere membership in a union is distinguishable from speech or activities as part of a union. Although speech or actions may require the speech to be a matter of public concern, membership alone does not require a matter of public concern. Therefore, Plaintiff's membership in a union does not require the public concern test, and the membership is protected within his First Amendment rights. *See, e.g. Glass v. Snellbaker*, Civ. A. No. 05-1971(JBS), 2007 WL 1723472, at *5 n.2 (D.N.J. June 14, 2007) ("When a public employee's organization performs some activities that are of public vonernc [sic] and some that are not, it appears that if an employer . . . punishes the right to associate . . ., then the employer also incidentally burdens protected rights . . . .")

B. Ordinary Firmness and Substantial Factor

The Plaintiff asserts that the January 21, 2005 directives were instituted in retaliation for the Plaintiff's association with the Fraternal Order of the Police. As stated previously, there is a question of material fact as to whether the retaliation would deter a person of ordinary firmness from exercising his First Amendment rights. In this count, the question is whether the directives would deter a person of ordinary firmness from participating as a member of a union. This is a question of material fact for the jury. Furthermore, there is a question of material fact to whether Plaintiff's membership in the union was a substantial factor in the alleged retaliation. Plaintiff does not have to show "but-for"

causation. *Suppan*, 203 F.3d at 236. The Defendants likely were aware of Plaintiff's membership in the Fraternal Order of the Police, as he had pursued a grievance pursuant to the Collective Bargaining Agreement against Duryea Borough for his termination. Therefore, a reasonable juror could find that the January 21, 2005 directives were a substantial factor in the alleged retaliation. As there are questions of fact with respect to the second prong of the retaliation test, the Court need not address the third prong.

V. Count IV - First Amendment Retaliation - Petition

The Defendants' motion for summary judgment does not mention or request summary judgment on Count IV. Therefore, the Court will not address Count IV at this time.

CONCLUSION

Construing the facts in a light most favorable to Plaintiff, the Court finds that Defendants' motion for summary judgment should be granted in part and denied in part. Defendants' motion will be granted with respect to the Fourth Amendment claims, which are inapplicable to this case. Defendants' motion will also be granted with respect to the Fourteenth Amendment pre-deprivation and post-deprivation procedural due process claims, as the Plaintiff adequate process through the collective bargaining agreement's grievance procedure. Defendants' motion will be granted with respect to

the First Amendment retaliation claim based upon Plaintiff's speech on police and union matters, as Plaintiff has failed to demonstrate sufficient evidence of protected speech. Defendants' motion will be denied with respect to the First Amendment retaliation claim in Count II based upon the Plaintiff's filing of the 2003 grievance as questions of material fact exist with respect to this claim. Defendants' motion will also be denied as to Count III's First Amendment retaliation claim based upon the right of association due to outstanding questions of material fact. Finally, as the Defendants have not moved on Count IV in their summary judgment motion, that Count will remain.

An appropriate order shall follow.

November 15, 2007
Date

/s/ A. Richard Caputo
A. Richard Caputo
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CHARLES GUARNIERI, Plaintiff, v. DURYEA BOROUGH, et al., Defendants.	No. 3:05-CV-01422 (JUDGE CAPUTO)

ORDER

NOW, this 15th day of November, 2007, **IT IS HEREBY ORDERED** that Defendants' Motion for Summary Judgment (Doc. 39) is **GRANTED** in part and **DENIED** in part as follows:

1. Defendants' motion will be **GRANTED** with respect to the Fourth Amendment claims.

2. Defendants' motion will be **GRANTED** with respect to the Fourteenth Amendment claims for pre-deprivation and post-deprivation process in Count I.

3. Defendants' motion will be **GRANTED** with respect to the First Amendment claim for violation of the right to free speech in Count II.

4. Defendants' motion will be **DENIED** with respect to the First Amendment claim for violation of the right to freedom of petition in Count II.

5. Defendants' motion will be **DENIED** with respect to the First Amendment claim for violation of the right to free association in Count III.

6. Plaintiff's claim for violation of the right to freedom of petition pursuant to the First Amendment in Count IV will remain, as Defendants failed to move for its dismissal in their motion.

/s/ A. Richard Caputo
A. Richard Caputo
United States District Judge

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 08-3949

CHARLES J. GUARNIERI, Jr.

v.

DURYEA BOROUGH; DURYEA BOROUGH COUNCIL; ANN DOMMES, Individually and in her Official Capacity as Council President; LOIS MORREALE, Individually and in her Official Capacity as Borough Secretary; FRANK GROBLEWSKI, Individually and in his Official Capacity as Councilman; EDWARD ORKWIS, Individually and in his Official Capacity as Councilman; ROBERT WEBB, Individually and in his Official Capacity as Councilman; AUDREY YAGER, Individually and in her Official Capacity as Councilwoman; JOAN ORLOSKI, Individually and in her Official Capacity as Councilwoman; AL AKULONIS, Individually and in his Official Capacity as Councilman,

Appellants

No. 08-4428

CHARLES J. GUARNIERI, Jr
Appellant

v.

DURYEA BOROUGH; DURYEA BOROUGH COUNCIL; ANN DOMMES, Individually and in her Official Capacity as Council President; LOIS MORREALE, Individually and in her Official Capacity as Borough Secretary; FRANK GROBLEWSKI, Individually and in his Official Capacity as Councilman; EDWARD ORKWIS, Individually and in his Official Capacity as Councilman; ROBERT WEBB, Individually and in his Official Capacity as Councilman; AUDREY YAGER, Individually and in her Official Capacity as Councilwoman; JOAN ORLOSKI, Individually and in her Official Capacity as Councilwoman; AL AKULONIS, Individually and in his Official Capacity as Councilman.

SUR PETITION FOR REHEARING

Present: Scirica, Chief Judge, Sloviter, McKee, Rendell, Barry, Ambro, Fuentes, Smith, Fisher, Chagares, Jordan and Hardiman, Circuit Judges

The petition for rehearing filed by Appellants/Cross-Appellees in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,

/s/ Dolores K. Sloviter
Circuit Judge

Dated: March 4, 2010
CRG/cc: Cynthia L. Pollick, Esq.
Karoline Mechalchick, Esq.
Joseph A. O'Brien, Esq.